FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

# No. 840

MYRL E. ALEXANDER, WARDEN
*Petitioner*

*v.*

UNITED STATES OF AMERICA ex rel.
JOHN MYRON KULICK
*Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

# No. 535

THEODORE MARTIN SUNAL
*Petitioner*

*v.*

DAVID R. LARGE, SUPERINTENDENT
*Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# JOINT BRIEF FOR RESPONDENT KULICK AND PETITIONER SUNAL

HAYDEN C. COVINGTON
*Counsel*

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## SUMMARY OF JOINT ARGUMENT

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**ONE**

**Refusal by the sentencing courts to permit prisoners to make their defenses to the indictments and the holding that it was necessary for prisoners to submit to induction and thereafter apply for writs of habeas corpus as the only remedy were denials of judicial trials and fundamental constitutional rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution so as to make the convictions subject to collateral attack on habeas corpus** ..... 32-55

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(6) Each one of the prisoners is exempt from training and service as a minister of religion and the actions of the draft boards in denying their claims for exemption are without basis in fact ..... 142

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

**No. 840**

**MYRL E. ALEXANDER, WARDEN**
***Petitioner***

***v.***

**UNITED STATES OF AMERICA ex rel.**
**JOHN MYRON KULICK**
***Respondent***

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

□

**No. 535**

**THEODORE MARTIN SUNAL**
***Petitioner***

***v.***

**DAVID R. LARGE, SUPERINTENDENT**
***Respondent***

□

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

□

# JOINT BRIEF FOR RESPONDENT KULICK AND PETITIONER SUNAL

## Jurisdiction

The jurisdiction of this Court in both cases is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The judgment of the circuit court of appeals in the *Kulick* case was entered October 29, 1946. [87]* Petition for writ of certiorari was filed within three months from that date. The judgment of the circuit court of appeals in the *Sunal* case was entered July 29, 1946. [118-119] Petition for writ of certiorari was filed within three months from that date.

## Opinions of Courts Below

The opinion of the circuit court of appeals in the *Kulick* case appears in the record. [81-87] It is reported at 157 F. 2d 811. The opinion of the district court in the *Kulick* case also appears in the record. [52-72] It is reported at 66 F. Supp. 183.

The opinion of the circuit court of appeals in the *Sunal* case appears in the record. [102-118] It is reported at 157 F. 2d 165. The opinion of the district court in the *Sunal* case appears in the record. [92-93] This opinion is not reported.

## Questions Presented

FUNDAMENTAL QUESTION

May the prisoners here (convicted under the Act of refusing to submit to induction when ordered to report therefor by their Selective Service boards) be released from custody on the writs of habeas corpus because the convicting courts illegally rejected their defenses that the orders were invalid, holding that they could not challenge the validity of the orders because such were immaterial as defenses to the indictments?

* All figures appearing in brackets herein denote pages of the printed record filed in each case.

SUBSIDIARY QUESTIONS

1. Was the denial of the prisoners' right to be heard on the proffered defenses such a violation of fundamental constitutional rights as to make the judgments subject to collateral attack and ground for discharge on writ of habeas corpus?

2. If not, did extraordinary circumstances exist requiring the courts below to hold that the writ of habeas corpus should be used as a substitute for an appeal to review the errors of the convicting courts in these cases?

3. If habeas corpus is available as a remedy to these prisoners, should the inquiry by court hearing the writs be extended to (a) whether the convicting court illegally denied the prisoners' tendered defenses or (b) whether the draft boards illegally ordered the prisoners to report for induction, or both?

4. If the hearing extends to an inquiry of whether the orders of the draft boards are illegal, does the undisputed evidence in both cases show (a) that the denials of prisoners' claims for exemption from training and service were without basis in fact and therefore in excess of the jurisdiction of the boards and (b) that the prisoners were denied rights of procedural due process contrary to the Fifth Amendment to the Constitution by the boards?

## Statutes and Regulations Involved

Scope and effect of the Habeas Corpus Act (28 U. S. C. §§ 451-464) are involved. Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are also drawn in question here, as well as Sections 615.82, 622.44, 622.51, 623.1, 623.2, 625.1, 625.2, 626.1, 626.2, 626.3, 627.13, and 652.2 (b) of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et. seq.*) promulgated by the President under said Act.

## Constitutional Provisions Involved

Clause 2 in Section 9 of Article I concerning the writ of habeas corpus is involved. Clause 3 in Section 9 of Article I, prohibiting bills of attainder, is involved. Clauses 1 to 3 in Section 2 of Article III, investing the judicial powers, and the Fifth and Sixth Amendments, are also involved.

## Statement of Kulick Case

### FORM AND HISTORY OF ACTION

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of John Myron Kulick. It was alleged that Kulick was illegally restrained of his liberty under a judgment and commitment charging him with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the local board. [4, 6-22]

The district court issued the writ of habeas corpus. [4, 24] The warden filed his return, together with a supplementary return and motion to dismiss. [4, 26-33] Evidence was received. [4, 34-46] The case was argued, at the conclusion of which the court took the matter under advisement, reserving decision. [4, 45] On May 6, 1946, the court discharged the writ of habeas corpus and remanded Kulick to the custody of the warden. [3; 4, 72] Thereupon application made to have Kulick admitted to bail pending a disposition of his appeal was granted. [5, 73] The court entered findings of fact and conclusions of law, as well as the judgment. [4, 56-72] Notice of appeal and bond were duly filed.

In due course the appeal was briefed, argued and submitted to the circuit court of appeals. [81, 87] The judgment was reversed. [87] It has been brought here upon writ of certiorari. [88]

## FACTS

Kulick was indicted in the United States District Court for the Southern District of New York. It was charged that he unlawfully and knowingly violated the Selective Training and Service Act of 1940 by failing and refusing to submit to induction as ordered by the armed forces after reporting for induction pursuant to the order of his local board. [7, 22] (TR 190)* The trial to a jury in that court began on May 2, 1945, concluding on May 3, 1945. [14-16, 38, 47] (TR 1, 190, 196) Upon the trial there was offered and received into evidence his entire draft board file showing the proceedings in reference to Kulick from the date of his registration to the date of his refusal to submit to induction, including evidence before the administrative agency on the status of Kulick under the Act. [40] (TR 29-34, 36-41)**

John Myron Kulick registered with Local Board No. 254, Jackson Heights, New York City, on June 30, 1942. (TR 22, 26) At the time he was 19 years of age. (TR 22). A questionnaire mailed to him on November 25, 1942, he returned properly filled out. (TR 22) He claimed therein to be a regular and duly ordained minister of religion. [8, 57] He showed that he devoted his full time to preaching as a missionary evangelistic minister for the Watchtower

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* Figures appearing in parentheses preceded by "TR" herein denote pages of the typewritten Transcript of the Record in the criminal trial of the *Kulick* case.

** Upon the hearing of the writ of habeas corpus in the trial court below the transcript of the evidence and proceedings of the Kulick's criminal trial was received in evidence as Exhibit 1. [39] Also the entire draft board file was received in evidence as Exhibit 2. [40] Hereafter certain portions of the draft board file will be referred to as exhibits identified by letters of the alphabet. Such identification is the designation given by the trial court in the criminal proceedings. When the exhibits were received in evidence (Exhibit 2) in the habeas corpus proceedings in the trial court below the documents still bore the identification [redacted] in the criminal proceedings.

Bible and Tract Society and Jehovah's witnesses. [8, 57] He showed that he was recognized by the Society, the legal governing body for Jehovah's witnesses, as an ordained minister of the gospel of God's kingdom. [8, 63-64] The Society had duly certified him to be such. [8, 63-64] He claimed exemption from all training and service under the Act by requesting the board to place him in Class IV-D, the classification provided for in the Regulations and under the Act. [8, 57] To his questionnaire he attached documentary evidence corroborating his claim for exemption as a minister, showing how that he regularly taught and preached as a minister of religion. [8, 57] In a statement (Defendant's Exhibit M, TR 33-34, 36) attached to his questionnaire, Kulick informed the board that he had taken an extensive course in the Watchtower divinity schools conducted by Jehovah's witnesses from 1935 to 1939 in preparation for the ministry. In his statement he pointed out that he had been ordained through prescribed ceremony of ordination in 1939; that although he had been engaged for several years part-time in the missionary work, he became a full-time pioneer minister in 1940, two years before he registered, which full-time missionary work required that he devote 150 hours thereto monthly; that he was fully consecrated as a minister in 1939, which was before this Country became involved in the war; that he was in sympathy with the democratic nations and their struggle against totalitarian aggression; that over six thousand of Jehovah's witnesses had been imprisoned in concentration camps in Germany since 1933, many of whom had been destroyed. (TR 33-34, 36, Exhibit M)

Upon the trial of the case, the judge of the convicting court allowed Kulick to testify limitedly as to his training, preparation and activity both as a student preparing for the ministry and as a minister. (TR 77-80) However, the greater part of his *de novo* testimony relating exclusively to his background and training was excluded by the court,

to which exception was taken and extensive offers of proof made. (TR 80-94) The court then permitted Kulick to testify that he entered the full-time pioneer missionary activity in June of 1940 during his summer vacation from school, returning to school and temporarily abandoning his full-time activity in the ministry in October 1940. He spent about four months all together in the full-time ministry in 1940. (TR 94-95) Kulick testified that in 1940 he went to school for another year; that he continued his part-time ministry during such period; that he obtained a secular job in August 1941 and continued therein until July 1942, at which time he quit secular work and re-entered the full-time pioneer evangelistic work. (TR 94-95) Kulick testified that ever since July 1942 he had been engaged in the full-time ministry and since that time he had not engaged in any full-time secular work or job. (TR 95-96)

To his questionnaire, filed in the latter part of 1942, he attached a certificate of ordination issued by the Watchtower Bible and Tract Society. This certicate showed that he had been baptized and had acted as a direct representative of the Society to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the gospel in territory definitely assigned to him; that Kulick had wholly consecrated himself as a servant of Christ Jesus and Almighty God; had taken a course of study in the Bible and Bible helps prescribed by the Society and had shown himself apt to preach and teach the gospel, and was therefore declared by the Society a duly ordained minister of the gospel and authorized to represent said Society as a minister and preacher of the gospel. [8, 57, 63-64]

On February 4, 1943, Kulick wrote his local board calling its attention to Opinion No. 14 of National Headquarters of Selective Service System, as amended on November 2, 1942, concerning the ministerial status of Jehovah's witnesses. He mentioned that it was not necessary for his

name to be on the certified official list in order to be eligible for exemption as a minister of religion. He requested the board to place the letter in his file along with the questionnaire. This was to answer the question raised by correspondence between the local board and the New York City Selective Service Director. The position taken by Kulick as to the absence of his name from the certified official list was augmented by his statement dated April 8, 1943. These documents were received in evidence upon Kulick's criminal trial. (TR 32-34, 40)

The papers which Kulick filed with the local board prior to his classification and along with his questionnaire showed that he discontinued his full-time secular employment with RCA Communications on July 3, 1942. However, the papers showed that during the time he was performing secular work he nevertheless regularly continued to preach and teach as a missionary evangelist each week as a part-time minister. [56-57] The papers also showed that after the time of the filing of his questionnaire he had been engaged in full-time pioneer missionary evangelistic work, devoting a minimum of 150 hours monthly to the performance of his duties as a minister. [56-57] The local board classified him in I-A on March 29, 1943, making him liable for training and service in the armed forces. [57] He requested a personal appearance, which was denied by the local board in a statement that the board was reconsidering his classification upon the basis of the evidence submitted by him along with his questionnaire. [8-9, 57] Thereupon Kulick secured and mailed to the local board affidavits from Eutheme Chrysomalis, presiding minister of the Astoria, New York, congregation of Jehovah's witnesses; Fred N. Severud, presiding minister of the White Plains, New York, congregation of Jehovah's witnesses, and Leo Buczek, presiding minister of the Lower Manhattan, New York City, company of Jehovah's witnesses. These affidavits showed the extensive training and background of Kulick in the various min-

istry schools attended by him in preparation for his ministry; that he had been regularly teaching and preaching as a missionary evangelist in behalf of the Watchtower Society since 1939; that he was regarded by Jehovah's witnesses as standing in relation to them as do the clergy of the orthodox denominations and that at the time of the making of the affidavits Kulick was a full-time pioneer minister engaged in preaching as one of Jehovah's witnesses under direction of the Watchtower Society.* The local board thereafter exempted Kulick from all training and service by classifying him in IV-D as a minister of religion on April 28, 1943. [57] He received notice thereof May 5, 1943. (TR 106)

In August, 1943, Kulick obtained part-time employment as a professional model. [57] (TR 103) He said that he devoted only two hours weekly on an average to modeling, but said at times he had done more than two hours weekly modeling. However, he insisted that at no time did his modeling work interfere with or prevent his fulfilling his full-time missionary work. (TR 104) It is true that he testified that he told the agent of the FBI that he *could* earn at times $35.00 per week in this part-time work. The undisputed evidence showed, and the habeas corpus court found, that he averaged but two hours per week. [58] Furthermore the court found that, in spite of his modeling work, he was able to devote a minimum of 150 hours monthly to his missionary evangelistic service, as testified by Kulick. This was the number of hours prescribed by the Society for all full-time pioneer ministers, according to the findings of the trial court below. [57]

On August 23, 1944, the local board received a telephone message from a Mrs. Greenbaum, who was connected with another draft board (Local Board No. 255) informing Kulick's board that "a mother of three sons in service was at Board 255 raising quite a fuss because this boy is *not* in

* These affidavits were received in evidence upon the trial of the criminal proceedings. (TR 33, 40)

service." The informant said that the complainant was a neighbor to Kulick. The informant reported that the neighbor stated that Kulick spent "most of his time around the house when he isn't posing (at times in uniform) earning $40 an hour." [82] On the same day, as result of this hearsay information, the local board changed Kulick's classification from IV-D to I-A, making him liable for training and service. This was followed up by an order commanding him to appear on September 11, 1944, for a preinduction physical examination. [82] On August 26, 1944, Kulick in writing requested a hearing before the local board to discuss the action taken by the board and his claim for exemption. His request for personal appearance was granted for September 30, 1944. [82] (TR 44, 59)

Upon Kulick's personal appearance before the local board he discussed extensively his classification and offered oral evidence on additional material matters not covered in the written documentary evidence contained in his file. This was about his activity as a minister. It showed, among other things, in addition to his full-time missionary activity, that he preached regularly each week, in the orthodox manner, from the pulpit to a congregation of over 130 persons as an assistant presiding minister. (TR 107-109) The local board informed him that it did not need any grounds for changing his classification, in response to his statement to the board that there had been no change in his ministerial status. (TR 109-110) He informed the board that he devoted an average of two hours only per week to his modeling work from which he earned money, at the rate of $7.50 per hour,* sufficient to sustain himself in his preaching activity. (TR 110-111) The board asked him if he would go into the army as a chaplain and he replied that he would not.

* Even assuming that Kulick earned $35.00 weekly as a model, it would not be reasonable to conclude that he devoted more than five hours per week to this modeling work because the most he ever earned was $35.00 per week which, at $7.50 per hour, would be not more than five hours per week.

(TR 112) (The Court can judicially notice that the Army Regulations do not provide for induction of chaplains.) One member of the board stated that the board would not say that Kulick was not a minister. (TR 113) Kulick explained fully why his name did not appear on the certified official list and that it was unnecessary that it be thereon in order for him to be exempted as a minister. (TR 113-114) In answer to a question of the board, he explained about his having appeared in the army uniform for the purpose of being photographed in an army uniform. This was in his capacity only as a professional model. (TR 115-116) He was before the board upon his personal appearance for almost an hour. (TR 119)

The clerk testified that no written memorandum of any of the oral testimony was reduced to writing. (TR 45-46) A member of the board also testified that none of the oral evidence was reduced to writing. (TR 69) The board member said that the board considered all of the oral evidence offered by Kulick at his personal appearance. (TR 69-70) The board member testified that although the board concluded that most of Kulick's time was spent in professional modeling, he later clarified this by stating that he did not know how much time Kulick devoted to his professional modeling. (TR 70, 72) But he said he did recall that Kulick stated he devoted five hours per day and 150 hours per month in his preaching and teaching the gospel. (TR 69-70) Later on the board member said that, as he remembered, Kulick appeared to devote the better part of the day to his modeling work. (TR 70) Finally he said that Kulick stated he spent an average of five hours daily to his ministerial duties and the rest of his time to professional modeling. (TR 72)

It was unnecessary for Kulick to give any testimony on the habeas corpus hearing about what he told the board upon the hearing and about what the board members said. Both he and representatives of the local board testified

fully about this upon the criminal trial. The transcript of the testimony given on the criminal trial was offered in evidence by the Government. It was received as an exhibit without any limitations, being admitted for all purposes. Therefore the testimony appearing in the transcript proves what took place before the board as much as does the file made by the draft board. The judge of the district court in the habeas corpus proceedings considered the transcript of the criminal proceedings in making his findings as to what took place before the local board in respect to Kulick's classification. It is improper to limit consideration or exclude the transcript of the testimony from consideration in determining what the draft board did. All the evidence must be considered. It cannot be considered piecemeal as the Government would have the Court do in its suggestion to disregard the transcript.

The local board rejected his evidence and denied his claim for exemption because he had "been photographed in military uniform". [57, 68] While it is true that a member of the local board called by the Government testified that "the time he spent in making his livelihood did not jibe" with the time he gave to his ministerial duties [57] the undisputed evidence before the local board showed that there was no evidence disputing Kulick's evidence that he devoted an average of only two hours weekly to his modeling work. Moreover, the court found that Kulick devoted an average of 150 hours monthly to his ministerial work as a pioneer. [57]

On August 31, 1944, Kulick's I-A classification was continued. [58] On September 8, 1944, he appealed his classification. [58]

A written statement on appeal was filed by Kulick reviewing the undisputed written evidence in his file showing that he was entitled to exemption as a minister of religion. [58] He added that he had informed the local board at his personal appearance that "occasionally I do secular work but

that this work did not interfere with my pioneer duties and requirements." [58] He showed that he devoted, in accordance with Selective Service Regulations, "all or *substantially* all" of his time to the performance of his duties as a minister of religion. [58] Additionally, he stated that the average time spent "doing this secular work does not exceed 2 hours for the entire week." [58]

The board of appeal on consideration of this case, on October 3, 1944, classified him as liable for training and service by placing him in Class I-A. [61-62] The chairman of the board of appeal testified that none of the oral evidence or the oral discussion upon Kulick's personal appearance before the local board was considered by the board of appeal because it had not been reduced to writing and it was not in the file. (TR 74-76)

The Director of Selective Service System refused to review his classification, which made it impossible for Kulick to obtain further relief within the Selective Service System. [62]

Having been previously declared acceptable by the armed forces upon a preinduction physical examination, [62] Kulick was ordered to report for induction into the armed forces on November 9, 1944. [62] He reported at the induction station and was again accepted for training and service after completion of the screening process given by the armed forces. [62] He was directed to submit to induction. [62] He refused to submit to induction, resulting in his discharge from the induction station, subsequent arrest and prosecution under the Act for an alleged violation of the Act. [62]

The trial judge of the convicting court held that the illegality of the draft board order could not be challenged by Kulick as a defense against the indictment, declaring that the only question involved was whether or not Kulick submitted to induction as ordered. [35-36] (TR 29) For the same reason the convicting judge would not permit Kulick

to inquire of the member of the local board as to why he was taken out of Class IV-D and placed in Class I-A. (TR 63-66, 66-68) For the same reason the convicting judge denied Kulick the right to offer *de novo* evidence concerning his training and activity as a minister. (TR 80, 84, 85, 86, 87-90, 91, 97-98, 99-103, 132-134)

At the outset of the trial the judge of the convicting court was informed of the proper construction that should be placed upon the Act and Regulations. During the examination of the jurors on *voir dire* counsel for Kulick declared to the judge, among other things, to-wit: "On the contrary, you take the Falbo decision and you take the Billings decision, I think it clearly shows that when a man has completed the administrative process he must be in a position to defend to the indictment and that the court can review the legality of the administrative order in defense to the indictment." (TR 6) The judge responded: "I think it all comes down to the same proposition that Jehovah's Witnesses claim the right to set the law aside. I think it comes down to that. . . . I don't think that the courts are here to review the determinations of the Selective Service Board." (TR 6)

During the time that parts of the draft board file were offered in evidence the prosecuting attorney said: "If your Honor please, I object to this method. This is an attempt to review the action of the local board. THE COURT: It is not going to be successful, I will tell you that for your information." (TR 29) Counsel for Kulick excepted, drawing this retort from the judge: "You may take an exception. It is noted. But this Court and this jury are not going to review the action of the local board, and I think you understand that better than most lawyers. That calls for no further observation from you." (TR 29)

On excluding evidence counsel for Kulick stated to the judge of the convicting court: "I desire to make my offer of proof. THE COURT: Go ahead and make your offer of

proof. I am merely pointing out that you are offering to prove a lot of things that you as a lawyer know are wholly irrelevant here." (TR 84)

While Kulick was attempting to elaborate upon what happened before the local board upon the personal appearance and also for the answering the testimony of the chairman of the local board the judge of the convicting court stopped him and reminded counsel for Kulick in these words, to wit: "I am telling this witness that I do not want him to repeat verbatim what he said to the board, and if it is necessary I will repeat that to you. We have got to bring this trial to a close at some time, and we are not going to have him repeat verbatim word for word what he said to the board. If you do not like that take an exception." (TR 118)

At the close of all the evidence in the criminal trial, Kulick moved for dismissal of the indictment and for a directed verdict upon legal and constitutional grounds which are apparent in the record. The motion was denied to which Kulick excepted. (TR 136, 144)

Kulick's numerous requested instructions to the jury were denied because the judge of the convicting court was of the opinion that the validity of the draft board order was not a matter for the consideration of the court or the jury. (TR 145-189, 194-195) The judge of the convicting court instructed the jury that "it must strike you as rather an idle thing for you to be asked to deliberate and to pass judgment upon an issue which really isn't contested. I think it is an incongruous thing myself, but that is the law of the land. If a man does not plead guilty to a charge he has the right to be tried by a jury. . . . [¶] I told you when you were being examined that it might be necessary to tell you that this jury does not sit in review on the action of the local board. You are not here to substitute your judgment for the action of the local board. And I asked you if you would be prepared to accept this in-

struction. I repeat it at this time. It doesn't make the slightest particle of difference whether you think this man was properly classified or not, whether you think he was an ordained minister or not. That has nothing to do with the performance of your duties. All that you have to determine is whether he reported for induction, whether he submitted himself to induction in the United States armed forces. I state that with great confidence because it has been decided in a great many of the courts of the United States during the past few years under the Selective Service Law, and in the cases of other persons claiming to be affiliated with the sect to which reference has been made in this case; and the courts have universally held, and they have been sustained by the higher courts, that there is no question before the jury as to whether the local board acted in accordance with the jury's judgment or not. . . . I merely explain these things so that you will understand the system of law under which the selective service of American citizens found to be physically qualified to serve the Government has been administered, and why it would be impossible for any such system to function if juries and the courts were to determine whether a given individual should be in the Army or the Navy. [¶] That is the reason why I said to you at the outset, and I now repeat to you, it is no part of your job to consider whether you think the classification adopted in this case was wise or unwise. Your only job is to determine whether under the evidence in this case it has been shown to you beyond a reasonable doubt that this defendant failed to submit to induction into the armed forces of the United States." (TR 190, 191-192, 193)

Kulick duly excepted extensively to each and every part of the above charge and holding of the convicting court on the grounds that the court had stricken all of the evidence received in behalf of Kulick showing that he was a minister of religion and exempt from training and service and thereby precluded the jury from considering said evidence, in-

structed the jury to find Kulick guilty, which denied him the right of trial by jury [47-51] and that the court thereby violated Kulick's constitutional rights, denied him a judicial trial and converted the law into an unconstitutional law, contrary to the bill of attainder clause of the Constitution, and abridged his rights to due process of law, in violation of the Fifth Amendment to the Constitution. [47-51]

Kulick was convicted by the jury. [52] (TR 196) Thereafter he was sentenced to serve a term of three and one-half years in the custody of the Attorney General. [52] (TR 197-198) Kulick did not appeal from the judgment of conviction. [52] Kulick was committed to the custody of the warden of the Federal Correctional Institution at Danbury, Connecticut, where he remained until released upon bail pending a disposition of his appeal in these proceedings. [73-74]

## HOW ISSUES RAISED

The issues were raised by the petition for writ of habeas corpus, the returns of the warden, the evidence received upon the hearing and the order of the district court discharging the writ and remanding Kulick to custody of respondent. [6-22, 26-29, 30-33] In the petition for writ of habeas corpus, Kulick contended that upon the trial of the indictment before the jury in the District Court in the Southern District of New York, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [14-16] He contended that the convicting court deprived him of a judicial trial and denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, in rejecting his evidence, in refusing charges to jury, and in refusing the jury, by charge of the court, the right to consider evidence showing the invalidity of the order. [14-16] By reason of this action of

the convicting court, he claimed that the Act was given an unconstitutional construction causing him to be penalized contrary to the due process clause and bill of attainder clause thus denying his defenses to the indictment. [14-16] He contended that the court transferred the judicial power of the court to the draft board, denied him his right of trial by jury, refused him the right to a judicial trial and abridged his liberty, contrary to the due process clause of the Fifth Amendment to the Constitution. [16] Moreover, he alleged that the Act and Regulations, by construction of the court, had been transformed into a bill of attainder, contrary to Clause 3 in Section 9 of Article I of the Constitution. [16]

The courts below found that extraordinary circumstances existed warranting the use of habeas corpus to review the criminal proceedings. [53, 82-84] The trial court below, however, erroneously held that the action of the convicting court was not ground for discharge upon a petition for writ of habeas corpus, because the draft board file failed to show that Kulick was arbitrarily and capriciously classified and illegally deprived of his rights under the Act and Regulations by the Selective Service System. [53] Moreover, the district court below held that the action of the convicting court, depriving Kulick of his defenses, was harmless error and not ground for discharge of Kulick because the draft board record contained evidence on which the draft boards were justified in placing him in Class I-A and denying his claim for exemption as a minister of religion. [56-72] The basis for this conclusion was that, because he had devoted part of his time to the performance of secular work, Kulick could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [56-72] The district court concluded that the action of the draft boards in denying Kulick his ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary and capricious.

[70-72] The district court below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [72] The court of appeals below overruled the district court on these points and declared that the imprisonment of Kulick was unlawful and that he was entitled to a discharge from custody. [81-88] The court of appeals below held that the denial of the right to make his defense to the indictment was ground for discharge. [81-88]

## Statement of Sunal Case

### FORM AND HISTORY OF ACTION.

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of Rudolph J. Sunal, brother of Theodore Martin Sunal. It was alleged that Theodore Martin Sunal was illegally restrained of his liberty under a judgment and commitment of the United States District Court for the Western District of Pennsylvania based upon an indictment charging Sunal with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the Selective Service System. [1-20]

The district court issued the writ of habeas corpus. [20] The warden filed his return, together with a demurrer and motion to dismiss. [24-27] Evidence was received. [89-94] The case was argued, at the conclusion of which the court discharged the writ of habeas corpus and remanded Sunal to the custody of the warden. [98-99] Thereupon application was made to have Sunal admitted to bail pending a disposition of his appeal. [98] Bail was allowed because of substantial questions that should be decided upon appeal. [99] The district court entered findings and conclusions as well as the judgment. [96-98] Notice of appeal and bond were duly filed.

In due course the appeal was briefed, argued and submitted to the circuit court of appeals. [101, 102] The judgment was affirmed. [118-119] It has been brought here upon writ of certiorari. [119]

## FACTS

Sunal duly registered under the Act with Local Board No. 26, Pittsburgh, Pennsylvania. On January 15, 1941, he filed his questionnaire [28-33] in which he stated in Series VIII that he was not a minister of religion. [30] However, he claimed classification in Class IV. [31]

As a result of his statement that he had conscientious objections to both combatant and noncombatant service [31] he was forwarded a Special Form for Conscientious Objector. [34-37] He filled it out stating that "From childhood, through parental guidance have I been taught the necessary steps for true Christianity. The Bible used as the source of all training. . . . As one of Jehovah's witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear according to Matt. 24: 14 and Isaiah 61: 1, 2." [34, 35] He stated that he was associated with the Watchtower Bible and Tract Society, the governing body of Jehovah's witnesses, having been raised from childhood in such faith. [36]

On May 10, 1941, the local board placed him in Class 1-A. [31] On May 15, 1941, he submitted to the local board an affidavit from Joseph J. Petti, presiding minister, showing that Sunal was "a regular and an ordained minister of God serving as such for Jehovah's Witnesses under the jurisdiction of the Allegheny Unit of Pittsburgh Company of Jehovah's Witnesses and that he has been so actively engaged regularly since the year 1935." [37] Along with such affidavit Sunal submitted extensive documentary evidence to support his claim for exemption as a minister of religion. [32, 37]

Such documentary evidence consisted of two pamphlets

published by the Watchtower Society, as well as an ordination card issued by the Society showing that Sunal had been ordained to preach the gospel of God's kingdom, which is of paramount importance. In his statement dated May 15, 1941, filed with the board, he stated that he was associate minister of the Allegheny Unit of Jehovah's witnesses. (Exhibit C)

A quorum not being present on May 15, 1941, the board postponed a determination of his case until June 24, 1941, when a quorum was present. [32] The local board denied Sunal's claim for exemption because it did not "believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers." [32] He appealed from the 1-A classification on July 1, 1941. [31] On July 8, 1941, the board permitted him to appear before it again.

A memorandum made by the local board concerning the hearing reads that Sunal "stated he has no regular church or institution where he preaches, but goes from house to house in the evening to teach their doctrines. He receives absolutely no salary or remuneration for this, and depends entirely on his secular job to support himself." [39]

In a letter dated July 8, 1941, to the appeal agent, Sunal submitted additional facts pertaining to his ministerial status which the appeal agent forwarded to the board of appeal. (Exhibit C). In his letter of July 10, 1941, to the local board, for the benefit of the board of appeal, Sunal reviewed his training for the ministry and explained why it was that he engaged in secular work to support him in his ministerial activity. [39-40]

On July 29, 1941, the board of appeal referred the case to the Department of Justice for investigation on his conscientious objection to military training and service. He was notified of a hearing of his claims before the Hearing Officer of the Department of Justice to be held on December 30, 1941. Lydia Dorst and Tom McKnight wrote letters

dated December 27, 1941, for filing with the Hearing Officer, certifying that Sunal was a duly ordained minister of religion. (Exhibit C) According to the records of the Hearing Officer, eighteen persons testified before him that Sunal was a minister of religion. (Exhibit C)

The Hearing Officer is said to have stated upon the hearing that there "is no evidence that can be construed as evidence which is unfavorable to or tends to defeat" Sunal's claim. [42] In his letter dated December 28, 1941, to the Board of Appeal Sunal explained why he stated he was not a minister of religion in his questionnaire and he amended Series VIII of his questionnaire as follows: "In that statement under Series VIII of the questionnaire, I refused to concede or acknowledge, denied myself the title of Minister of Religion. This I did on grounds alone that as defined and understood by myself and the scriptures do teach that 'Religion is doing anything that is contrary to the will of God Almighty.' I also wish to grant for benefit of clarification that, 'Christianity is the following in the footsteps of Christ Jesus and doing the will of his Father Jehovah.' If the term Christianity had been used instead of Religion in that Series VIII of the questionnaire I would have answered thus.

1. (a) I *am* a minister of Christianity
   (b) I *do* customarily serve as a minister of Christianity
   (c) I *have been* a minister of the Allegheny Company of Jehovah's Witnesses.
   (d) I have been formally ordained." [43]*

On January 27, 1942, the board of appeal classified Sunal in IV-E. [31] On January 31, 1942, Sunal wrote the State Director of Selective Service to review his case, appeal it to the President and cause him to be granted his claim for exemption as a minister of religion. (Exhibit C) On Feb-

* His failure initially to fill out Series VIII of the Questionnaire or claim classification as a minister of religion therein, does not seem to have been considered by the Selective Service System.

ruary 26, 1942, in a letter addressed to Sunal the State Director refused to take action. (Exhibit C) On March 2, 1942, by letter, the National Director was requested by Sunal to review his case. This request was refused by letter dated April 20, 1942, from the Deputy Director. (Exhibit C) On March 9, 1942, Sunal was ordered to report to a civilian public service camp on March 19, 1942, to do work of national importance. (Exhibit C) On May 19, 1942, Sunal was convicted under Section 11 of the Act in the district court at Pittsburgh for failure to report. He was sentenced to prison to two years and fined $10000. [46, 114]

On December 6, 1943, Sunal was released from prison and on December 29, 1943, notified his local board of his return to his home. [46] On January 6, 1944, the State Director notified the local board that inasmuch as Sunal claimed classification as a minister, "it will be appropriate for you to consider his claim to a IV-D classification. If you believe that his activities are such that a IV-D classification is warranted, you should reopen his classification and advise him." [47]

On May 19, 1944, following the expiration of his sentence, he having been released on Conditional Release prior to the completion of his term in prison, the local board placed him in Class 1-A. [32, 46] He requested a personal appearance by letter dated May 26, 1944. (Exhibit C) A personal appearance was granted to him for June 9, 1944, at which time he appeared before the local board. [32, 49-50]

Letters and sworn statements signed by thirteen persons (some of whom were and some of whom were not Jehovah's witnesses) were presented to the local board at the time of the hearing. They showed that Sunal was a full-time pioneer minister, assistant to the presiding minister of the Allegheny congregation of the Pittsburgh company of Jehovah's witnesses, and that by reason thereof he stood in relation to Jehovah's witnesses as do the orthodox religious

clergy toward their congregation. [55-62]* Sixty-eight persons signed a petition certifying that Sunal was a regular minister of religion, preaching and teaching the principles of Christianity under the direction of Watchtower Bible and Tract Society as a full-time pioneer missionary evangelist. [63-65]

The undisputed evidence, upon his June 9, 1944, personal appearance, showed Sunal applied to the Watchtower Society for appointment as a full-time pioneer on or before January 1, 1944. By letter dated January 1, 1944, the Society wrote Sunal that he had been appointed as a full-time pioneer minister, requiring to perform 150 hours monthly, in preaching and teaching as a missionary evangelist. (Exhibit C)

On May 26, 1944, Sunal had informed the board that he devoted approximately four hours daily from 8 a.m. to 12 noon working as a mechanic at the George Maier Garage in Pittsburgh beginning January 1944. [48]

The board made a memorandum concerning this as follows: "He does not consider this a job, but a means of earning his daily bread. The remainder of the day is devoted to the ministry; gives approximately 150 hours per month." [48]

Upon Sunal's personal appearance on June 9, 1944, the board found that there had been "no change in status of registrant" and that his status was the same as "when classified by the appeal Board on 7/29/41. Registrant so classified to Class 1-A 3-O." [32] He was mailed such classification advice on June 24, 1944. [32] Sunal appealed from such classification in writing on July 1, 1944. [67]

On July 3, 1944, he filed a written statement upon appeal. In it he reviewed the reasons why he should be classified as a minister of religion and pointed out facts showing a change in his status. He emphasized points that had been

* See also unprinted letters appearing in Sunal's draft board file. (Exhibit C)

overlooked, or given no weight, by the local board concerning his claim for exemption. Among other things he stated: "I immediately chose to re-enter the field of ministry in a more responsible position and thus became directly appointed by the Watch Tower Bible and Tract Society as a full-time publisher. This appointment and authorization as such are in my file photostated. . . . The few early morning hours of five and six days a week I earn honestly my daily bread in the toils of labor and sweat." [68, 69]

The local board made a memorandum for the use of the board of appeal in which it illegally stated its argument and grounds for denying his claim for exemption as a minister of religion. [76] The board of appeal relied upon this statement [76] and also found that "Registrant has been a minister since 1935. He claims he devotes 150 hours a week [sic] to the ministry which does not include his appearance once a week before the congregated group of Allegheny Unit of Jehovah's Witnesses; it also does not include time spent in preparing to meet the audience." [77]

On September 21, 1944, Sunal, by letter, requested the State Director to review the classification given him. On September 26, 1944, the State Director declined any further action in behalf of Sunal. [78] Again the State Director informed him of the intention not to review his case, in answer to letter of Sunal to the National Director at Washington on September 21, 1944. The letter had been referred to the State Director for answer. [79]

Sunal was given several preinduction physical examinations and found acceptable for training and service. He was ordered, on October 7, 1944, to report for induction on October 25, 1944. [33] He appeared and refused to submit to induction. [33, 80-83] He was indicted for failure to submit to induction as commanded on October 25, 1944. [18-19]

Sunal "was tried to the Court before a jury in the United States District Court for the Western District of Pennsylvania on March 22, 1945. That upon such trial, [Sunal] at-

tempted to offer *de novo* evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file, which is marked as Exhibit C . . . [¶] Such evidence thus offered in behalf of [Sunal] as a defense to the indictment for the purpose of showing that the Draft Board exceeded its authority and acted illegally, was rejected by the Court, excluded on the ground that the trial Court was of the opinion that the jury could not inquire into the validity of the Draft Board proceedings and could not determine whether or not [Sunal] was or was not a minister of religion within the meaning of the Act and Regulations. [¶] Upon the trial, the Court charged the jury that in determining the guilt or innocence of [Sunal] under the indictment, that they could not consider whether or not the Draft Board acted illegally in classifying [him] or whether it exceeded its authority and that the question for the jury to determine was whether or not he unlawfully, willfully and knowingly failed and refused to submit to induction as alleged in the indictment. [¶] [Sunal] objected and excepted to the rulings of the Court in excluding the evidence and to the charge of the Court." [87-88]

Sunal was convicted on March 22, 1945, the second time, for an alleged violation of the Selective Training and Service Act by the United States District Court for the Western District of Pennsylvania. [17-18, 86-87] He was sentenced to the custody of the Attorney General for a period of five years. [17-18, 33]

No appeal was taken from such judgment. Sunal was committed to the custody of the warden of the Federal Prison Camp at Mill Point, West Virginia, where he remained until released upon bail pending a disposition of his appeal in these proceedings. [98]

HOW ISSUES RAISED

The issues were raised by the petition for writ of habeas corpus, the return of the warden and the order of the district court below. [1-17, 23-27, 98-99, 103] In the petition for writ of habeas corpus, Sunal contended that upon the trial of the indictment before the jury in the District Court for the Western District of Pennsylvania, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [2-3] He contended that the convicting court denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to submit to induction, and in refusing him the right to offer evidence showing the invalidity of the order. [11] By reason of this action of the convicting court, Sunal claimed that the Act was given an unconstitutional construction causing him to be penalized contrary to the due process clause and denied his defense to the indictment. [11-12] He contended that the court transferred the judicial power of the court to the draft board, denied his right of trial by jury, refused him the right to a judicial trial and abridged his liberty, contrary to the due process clause of the Fifth Amendment to the Constitution. [12] Moreover, he alleged that the Act and Regulations had been transformed, by construction of the court, into a bill of attainder, contrary to Clause 3, Section 9 of Article I of the Constitution. [12]

The courts below held that the action of the convicting court was ground for discharge upon a petition for writ of habeas corpus, only if the draft board file showed that Sunal had been arbitrarily and capriciously classified and illegally deprived of his rights under the Act and Regulations by the Selective Service System. [88-89, 107] However, the courts below found that extraordinary circumstances existed warranting the use of habeas corpus to review the criminal proceedings. [103-108] The courts below erroneously held that the action of the convicting court was

harmless error and not ground for discharge of Sunal because the draft board record contained evidence on which the draft boards were justified in placing him in Class I-A and denying his claim for exemption as a minister of religion. [89, 92, 96, 109, 112-115] The basis for this conclusion was that because Sunal devoted part of his time to the performance of secular work, he could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [90, 92-93, 115-117] The courts concluded that the action of the draft boards in denying Sunal the ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary or capricious. [93, 96-97, 113, 115-116] The courts below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [96-97, 109, 112] The courts below declared that the imprisonment of Sunal was lawful and that he was not entitled to a discharge from custody. [97, 118]

## SPECIFICATION OF ERRORS

The circuit court of appeals erred.

1. In failing to hold that the action of the convicting court complained of by Sunal was such a denial of fundamental constitutional rights as to make the conviction subject to collateral attack on habeas corpus.

2. In failing to hold that the extraordinary circumstances warranted the use of habeas corpus as a substitute for appeal to review mere errors of law.

3. In failing to hold that the draft board determination was in excess of its jurisdiction because made without basis in fact.

4. In affirming the judgment of the district court.

# POINTS FOR JOINT ARGUMENT

[See NOTE below]

## ONE

**Refusal by the sentencing courts to permit prisoners to make their defenses to the indictments and the holding that it was necessary for prisoners to submit to induction and thereafter apply for writs of habeas corpus as the only remedy were denials of judicial trials and fundamental constitutional rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution so as to make the convictions subject to collateral attack on habeas corpus.**

### A

**The history and express provisions of the Constitution securing the writ of habeas corpus and the statutes implementing the guarantee have been given a liberal interpretation so as to permit a broad scope of inquiry in determining the legality of custody.**

### B

**The denial of prisoners' defenses as a result of the unconstitutional construction placed upon the Act was a denial of fundamental rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution, making the judgment subject to collateral attack on habeas corpus.**

NOTE: An epitome of the various reasons supporting the points for argument or a summary of the prisoners' argument appears at the end of this brief under the heading "Concluding Summary". It appears at pages 137-143, infra. A disintegrated summary of the argument, showing references to pages of this brief where the respective parts of the argument appear, is part of the index at the beginning of this brief. It immediately precedes the table of cases cited.

## TWO

**Extraordinary and unusual circumstances in the law existed at the time of the convictions of these prisoners in these cases, justifying their failure to appeal and warranting their use of the writs of habeas corpus as a substitute for appeal, to review the unconstitutional denial of the defenses in the criminal trials of the prisoners.**

## THREE

**The scope of inquiry on the disposition of the writs of habeas corpus in these cases properly ought to extend to a determination of the validity of the draft board proceedings only in event this court concludes that the illegality of the proceedings in the convicting courts is not sufficient to justify a discharge of the prisoners.**

## FOUR

**The holdings of the trial court in the Kulick case and both of the courts below in the Sunal case that the orders of the draft boards were lawful are erroneous. The orders are illegal as a matter of law.**

A

The denials of the claims for exemption as ministers of religion made by the prisoners and their classifications by the draft boards were arbitrary, capricious and in excess of the jurisdiction of the draft boards, because they were without basis in fact.

B

The local board in the Kulick case deprived him of a full and fair hearing before the board of appeal through failure to reduce to writing oral evidence offered by Kulick upon his personal appearance. This action was contrary to the Regulations and violated his rights to procedural due process contrary to the due process clause of the Fifth Amendment to the Constitution.

## ONE

**Refusal by the sentencing courts to permit prisoners to make their defenses to the indictments and the holding that it was necessary for prisoners to submit to induction and thereafter apply for writs of habeas corpus as the only remedy were denials of judicial trials and fundamental constitutional rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution so as to make the convictions subject to collateral attack on habeas corpus.**

### A

**The history and express provisions of the Constitution securing the writ of habeas corpus and the statutes implementing the guarantee have been given a liberal interpretation so as to permit a broad scope of inquiry in determining the legality of custody.**

The intolerable abuses of the criminal process of the law of the land in England led to the invention by the chancery of a writ commanding the production of the body of the person detained. The writ, first called the *writ de homino replegiando,* later became known as the writ of habeas corpus. The writ of habeas corpus was issued before the Magna Charta under the name of *de odio et atia* and is specifically mentioned in Article 36 of the Magna Charta which provides that it shall "not be refused". During these periods it played an important part in enabling a person to avoid trials by ordeal and by battle in violation of the right to a judicial trial.

During the reign of Charles I, the king and his judges completely lost their reason and balance. The warden of the Fleet Prison had made returns to writs of habeas corpus, stating that the prisoners, in whose behalf they had been obtained, were confined by warrant of the privy council

or committed by special command of the king. Though counsel for the prisoners insisted that the council was bound to assign a sufficient cause of commitment, the judges decided that the royal mandate was warrant enough for any arrest and detention.

The House of Commons thereupon passed resolutions condemning the decision in *Darnel's Case* (1627) and, after a conference with the House of Lords, the measure known as the Petition of Right was passed in 1627. (3 Car. I, c. i) In section 5 of this Act are recited the above facts, and it was enacted "that no freeman in any such manner as is before mentioned be imprisoned or detained". Later, in 1641, by Act abolishing the Star Chamber, the right to the writ of habeas corpus was given to test the legality of commitments by command or warrant of the king or the privy council.

The reign of Charles II was marked by progress of the use of the writ of habeas corpus. Lord Clarendon was impeached for causing many persons to be imprisoned against the law and to be conveyed in custody to places outside of England. During 1679, in consequence of Clarendon's arbitrary proceedings, a new bill was introduced which passed both Houses and became the famous Habeas Corpus Act of 1679 (31 Car. II, c. 2)*

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom. In England after a long struggle it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, 'for the better securing of the liberty of the subject,' which, as Blackstone says, 'is frequently considered as another *Magna Charta*.' It was brought to America by the colonists, and claimed as among the immemorial rights de-

* Holdsworth, *History of the English Law*, vol. 9, pp. 108-125; Cooley, *Constitutional Limitations*, 8th ed., vol. 1, pp. 709-728; *Watson on the Constitution*, vol. 1, pp. 721-733; *Kent's Commentaries*, 12th ed. (Holmes), vol. 2, pp. 32-42.

scended to them from their ancestors. Naturally, therefore, when the confederated colonies became united states, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: 'The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion the public safety may require it.' . . .

"This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in light of it that we must determine the true meaning of the Constitution and the law . . .

"These considerations forbid any construction given to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of jurisdiction even were the reason for affirming it less cogent than they are." (Ex parte *Yerger*, 8 Wall. 85, 95-96, 102-103)*

In 1789 the writ of habeas corpus was first spoken of by the legislature when Congress passed the Act of September 24 (1 S. L. 81) to implement the provisions of the Constitution. The power was extended again by the Act of March 2, 1833, and again by the Act of August 29, 1842.

The Act of February 5, 1867, expanded the right to the writ to its present use. Section 14 of the Act of 1789, provides, among other things, that the writ shall extend to cases where prisoners are in custody by authority of the federal government and "are committed for trial before some court of the same". The provisions of the original act

* Compare *Bridges v. California*, 314 U. S. 252, 264-265. Mr. Justice Stone exhaustively reviews the history, law and constitutional provisions on the subject in *McNally v. Hill*, 293 U. S. 131, 135-139, to which reference is here made.

and the various amendments are now incorporated in Title 28 of the United States Code, sections 451 to 466.

In Walker v. Johnston, 312 U. S. 275, 285, the Court declared: "As we have said in Johnston v. Zerbst, 304 U. S. 458, Congress has expanded the rights of a petitioner on habeas corpus." Sustaining the claim for the writ, in *Smith v. O'Grady*, 312 U. S. 329, Mr. Justice Black referred to the writ as the great "historic remedy", thus echoing the views of the Court expressed in cases referred to above.

**B**

**The denial of prisoners' defenses as a result of the unconstitutional construction placed upon the Act was a denial of fundamental rights contrary to the due process clause of the Fifth Amendment to, and the bill of attainder clause of, the Constitution, making the judgments subject to collateral attack on habeas corpus.**

Ordinarily a judgment and commitment under which a prisoner is detained is impervious to collateral attack on habeas corpus or can be attacked only by direct appeal. But, if during the trial under an indictment, the prisoner's constitutional rights were denied him, the judgment of the sentencing court may be collaterally attacked and full inquiry of the denial of the rights had upon petition for writ of habeas corpus.

Upon the trial of the prisoners in the convicting courts they attempted to attack the draft board orders, made the basis of the indictments, on the ground that the orders were invalid. Both convicting courts held, as a matter of law, that the action of the draft boards could not be questioned under any circumstances in the prisoners' defense against the indictments. The courts held that the administrative proceedings leading up to the issuance of the orders were conclusively presumed to be valid and absolutely free from attack in trial of the indictments. The convicting courts held, as a matter of law, that unless and until the prisoners had

submitted to induction as required by the draft board orders, the administrative proceedings could not be questioned. The courts held that the orders could be questioned only after induction by way of writ of habeas corpus. The basis of the holdings of the convicting courts, resulting in the denial of the prisoners' tendered defenses, was due to erroneous misinterpretation of the Act by the courts of appeals and of the holding of this Court in the case of *Falbo* v. *United States*, 320 U. S. 549. This was merely a part of the false and unlawful construction placed upon the Act and Regulations by all of the inferior federal courts in the country. The denials of similar tendered defenses in other cases arising under the Act were later held by this Court to be erroneous and requiring reversal of judgments of conviction under the Act in circumstances identical to the denials of the tendered defenses by the convicting courts in these cases. *Smith* v. *United States*, 327 U. S. 114, *Estep* v. *United States*, 327 U. S. 114, *Gibson* v. *United States*, 67 S. Ct. 301, *Dodez* v. *United States*, 67 S. Ct. 301.

The prisoners in these cases contend that the erroneous construction of the Act by the convicting courts (resulting in such courts holding that the tendered defenses were irrelevant and immaterial and not permissible as a matter of law) constitutes an extraordinary and unusual denial of fundamental rights guaranteed by the Constitution. This is sufficient to permit the writs of habeas corpus to be employed to afford them relief from their unlawful detention.

In these two cases, in other words, the Court is requested to go a step further than the steps taken by it in *Smith*, *Estep*, *Gibson* and *Dodez* cases. The Court is now called upon to determine whether or not the erroneous construction and interpretation placed upon the Act by the convicting courts was unconstitutional. This Court must now decide whether the rejection of the tendered defenses in these cases, identical to the rulings of the trial courts in the *Smith*, *Estep*, *Gibson* and *Dodez* cases, entitles them to dis-

charge on habeas corpus as to the same rulings entitled Smith, Estep, Gibson and Dodez to new trials.

It has been uniformly held that to deny a defendant in a criminal or civil case the right to be heard and to make his defenses is a rank denial of procedural due process.*

Moreover, to deny one the right to be heard in his defense to a criminal charge is to deny a judicial trial contrary to the bill-of-attainder clause of the United States Constitution, in addition to amounting to a denial of procedural due process of law. *Cummings* v. *Missouri*, 4 Wall. 277, 320-332; *Kentucky* v. *Jones*, 10 Bush. (70 Ky.) 725; *United States* v. *Lovett*, 66 S. Ct. 1073.

It is argued that the construction of the statute by the inferior federal courts, while concededly wrong and illegal, is a mere error of law which is reviewable only upon appeal and not by writ of habeas corpus. The construction of the statute so as to cut out the only defenses that the prisoners in these cases had was more than a mere error of law. It was an egregious, serious and fundamental error which violated the constitution. An error of a court committed in defiance of the constitution is as unconstitutional as is an error by a legislative body or an administrative agency. The construction of the statute so as to preclude the defenses was a denial of due process of law as is shown herein. But even if it be considered not a denial of rights contrary to the general terms of the due process clause of the Fifth Amendment the error of construction violated the provisions of the Constitution, which prohibits bills of pains and penalties. "No bill of attainder or ex post facto law shall be passed." (Article 1, Section 9, Clause 3)

* McVeigh, *v.* United States, 11 Wall. 259, 261, 267-268; Windsor *v.* McVeigh, 93 U. S. 274, 277, 278-279; Hovey *v.* Elliott, 167 U. S. 409, 413-415, 417-418; Bradstreet *v.* Neptune, 3 Sumn. (U. S.) 600; Ong Chang Wing *v.* United States, 218 U. S. 272, 279; Chicago M. & S. P. R. *v.* Minnesota, 134 U. S. 418, 456-457; United States *ex rel.* Trainin *v.* Carr (CCA-2) 144 F. 2d 944; Estep *v.* United States, 327 U. S. 114, concurring opinion of Mr. Justice Murphy.

The construction placed upon the act denied prisoners their rights to make their defenses. The denial of the right to make a defense allowed by law is a denial of a judicial trial. A denial of a judicial trial by Act of Congress and the denial of such right by a court in an illegal construction of an Act, constitutes a violation of the clause prohibiting bills of attainder and bills of pains and penalties.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the denial of judicial trials in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition. See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462, and Vol. 3, pp. 66, 67; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

Recently the Court, in reaching back to *Cummings* v. *Missouri*, 4 Wall 277, had occasion to again reaffirm the doctrine which condemns the denial of judicial trials. An Act of Congress was held to be invalid as a bill of pains and penalties in *United States* v. *Lovett*, 66 S. Ct. 1073. A reference is made to the discussion in the opinions filed in this case for a more extensive discussion of the history of bills of attainder. See also the concurring opinion of Mr. Justice Black in *Keegan* v. *United States*, 325 U. S. 478, 495-498. A further discussion of the subject was made by Mr. Justice Black in his dissenting opinion in the case of In re *Summers*, 325 U. S. 561, 573. Reference is also made to the discussion on this subject appearing in the Brief for Petitioners filed in *Smith* v. *United States*, No. 66 October Term, 1945, and in *Estep* v. *United States*, No. 292 October Term, 1945, at pages 95 to 105, inclusive.

It is submitted that the specific provisions of the bill of attainder clause of the Constitution prohibit the conclusion that it is a mere error of law reviewable only upon appeal to deny the defenses urged by the pioneers in the convicting courts. It being an error of law which violates the constitutional provisions prevents the construction from being called a "mere" error of law. The error was grave enough to make void the judgments of convictions.

The doctrine of denial of defenses because of alleged contempt of law and flouting of the orders of administrative officers by a person, invoked by the convicting courts, has been condemned by this Court as a denial of constitutional rights. In *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418, the Court reversed a judgment where the answer of defendant, his evidence and his defenses had been stricken because of his contempt of court. The Court held that the entry of the judgment without affording an opportunity to defend was a violation of his rights of due process. There the Court said:

"[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever to be heard, would it be pretended that such an enactment would not be violative of

the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?" (*Hovey* v. *Elliott*, 167 U.S. 409, 413-418)

That the denial of the right to attack the orders because of their illegality is a denial of due process, is supported by *Windsor* v. *McVeigh*, 93 U.S. 274, 277-278. There it was said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." See also *McVeigh* v. *United States*, 11 Wall. 259, 267; *Bradstreet* v. *Neptune*, 3 Sumn. (U.S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

In *McVeigh* v. *United States*, 11 Wall, 259, 267, the court said that when one is assailed by an indictment or proceeding in the United States District Courts "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the right principles of the social compact and of the right administration of justice."

The Government in these cases attempts to absorb the shock of the impact of the *McVeigh* cases by stating that in those cases the accused was denied the right to speak at all in his defense. This argument of the Government is

a mere play upon words. It is specious and when considered in the light of realities is found to be factitious. What is the difference between the denial of the right to speak in one's behalf upon any tendered defense and the right to speak at all upon the only defense tendered or which could be tendered? There is no difference. The prisoners in these cases had their mouths shut, their hands tied and their legs hobbled as effectively by the holding of the convicting courts in these cases as did the accused in the *McVeigh* cases. The decisions in the *McVeigh* cases cannot be distinguished. The fact that they had the right to question the jurors and witnesses that appeared against them did not minimize the fundamental error of the court in cutting out their only defenses entirely from the cases. Certainly it is not necessary to show that the prisoners were denied all of their rights guaranteed by the Constitution before they can complain of the denial of one fundamental right secured by the Constitution. It is true that they enjoyed every right guaranteed by the Constitution except the only right that meant anything to them, namely, the right to make their defense. The other rights enjoyed by them upon their trials guaranteed by the Constitution did no good to them when the most important right, to wit, the right of defense was denied to them.

In *Rogers* v. *Peck*, 199 U. S. 425, 435, the court said that a defendant in a criminal case must be given an adequate and full opportunity to be heard in defense to an indictment.

In *Ong Chang Wing* v. *United States*, 218 U. S. 272, 279, it is said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, . . . with an opportunity to be heard, . . . then he has had due process of law."

In *Edwards* v. *United States*, 312 U. S. 473, the court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

The court, in *Dowell* v. *United States*, 221 U. S. 325, 330, held that an act whereby an administrative agency determined the facts of one's duty and the circumstances of his violation thereof, without an opportunity to be heard in his defense in court, was unconstitutional. Speaking of the constitutional provisions the court said: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In *Wong Wing* v. *United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. The court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." See also *Diaz* v. *United States*, 223 U. S. 442; *Lisemba* v. *California*, 314 U. S. 219, 236.

The federal judge of each district court in these cases refused to conduct a judicial trial. They proceeded to cut out all of the defenses. They tried the cases on an illegal theory, which confined the issue to whether prisoners submitted to inductio , similar to "trial by ordeal", and violated the due process clause of the Fifth Amendment, Clause 3 in Section 9 of Article I (prohibiting bills of attainder) and Article III investing judicial powers in the courts, not in administrative agencies.

Such illegal procedure caused the convicting courts to lose jurisdiction. They were ousted of jurisdiction to pro-

ceed further and pronounce sentence against prisoners. Such illegal action has been condemned thus: "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 23; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, 11, Comment (c)." (*Griffin* v. *Griffin*, 66 S. Ct. 556, 560)

"Even though the court has jurisdiction over the defendant, and even though he is given notice of the action, a judgment against him is void if he was denied all opportunity to be heard. Notice to a defendant of the claim which is being made against him is of no value to him if he is denied all opportunity to defend the claim. This may happen where under a statute of the State a reasonable opportunity to be heard is denied. It may happen where in the particular action the conduct of the court is so flagrant as to deny him an opportunity to be heard. Thus, if the court arbitrarily strikes out any answer which the defendant makes to the claim and renders judgment against him, the judgment is void . . . " (Restatement of the Law of Judgments, American Law Institute 1942, pages 39-40, Section 6, Chapter 2)

The denial of the right to make any and all valid defenses upon a trial is equal to, if not worse than, a denial of the right to have counsel, which concededly would be ground for discharge on habeas corpus. The Constitution guarantees both fair trial and counsel. Without the granting of either, upon request not waived as here, the trial court loses jurisdiction to pronounce sentence. The provisions of the Constitution guaranteeing a judicial trial are equally as strong and respectable as is the provision with reference to the right to have counsel. If a defendant is deprived

of the right of counsel it does him no good to have a trial. If he is also deprived of a judicial trial and the right to be heard in his defenses it does him no good to have counsel. If habeas corpus attack can reach collaterally the denials of one it should reach the other because there is no difference between the two rights. Both are expressly secured by the Constitution. The decision of the United States Eighth Circuit Court of Appeals in *Manning* v. *Biddle*, 14 F. 2d 518, 519, is apposite here. Cf. *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

It should not be as difficult as the Government would like to make it for the Court in determining whether the construction of the statute so as to cut out and strike the only defense that the prisoners had to make in the convicting court makes the judgment void. It seems that the many decisions that have heretofore been called to the attention of the Court should be sufficient to demonstrate the judgments are void and subject to collateral attack. But, if further argument or demonstration be needed to convince the Court of the contention here made by the prisoners it seems that the many cases involving collateral attacks upon the judgments of administrative agencies should be sufficient proof. Certainly if the denial of the right of a person to be heard in his only defense before an administrative agency makes the administrative judgment void, then for the same reasons the same denial of the same right by a court should make the judicial judgment void.

If the legislative department or the executive department should condemn a citizen after denying him the right to be heard in his only defense "would it be pretended that such . . . would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done by legislative or executive departments would be violative of the Constitution? If such power obtains, then the judi-

cial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent." (*Hovey* v. *Elliott*, 167 U. S. 409, 418) It seems therefore that the deprivation of rights by administrative agencies which has been considered by this Court to make the administrative judgment subject to collateral attack should be considered by the Court as grounds sufficient to make the judicial judgment subject to collateral attack, if it is shown that similiar denials were committed in the judicial proceedings.

Where a commissioner of immigration ignores the question presented and rejects evidence offered as did the trial courts here and takes away the right to be heard on the only issue involved it was held that the judgment of the administrative agency was void and subject to collateral attack. *White* v. *Chin Fong*, 253 U. S. 90. "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (*Morgan* v. *United States*, 298 U. S. 468, 479-481) "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority." *Morgan* v. *United States*, 304 U. S. 1, 14-15.

"Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. *Pittsburgh etc. Railway Co.* v. *Backus*, 154 U. S. 421, 426; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 171, et seq. It is apparent that

such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it." *Londoner* v. *Denver*, 210 U. S. 373, 386, Mr. Justice Moody. See also *Chicago, M. & St. Paul Ry. Co.* v. *Public Utilities Commission*, 274 U. S. 344.

Whereas misinterpretation of the law in reference to the essentials of a common law marriage by immigration officials caused them to reject pertinent evidence relating thereto there was not a full and fair hearing, contrary to the due process clause. Ex parte *Ver Pault* (C. C. A. 2d) 86 F. 2d 113. The failure to preserve a proper record of the evidence offered by a party to an administrative proceeding has been held a denial of due process making the judgment of the administrative agency subject to collateral attack. *Kwock Jan Fat* v. *White*, 253 U. S. 454, 464; *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 68, 69, Mr. Justice Cardozo.*

Indeed this Court, speaking through Mr. Justice Reed, has declared: "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross examination protects against falsehood.

* Cf. Myers v. Bethlehem Corp., 303 U. S. 41, 49; Shields v. Utah Idaho Railroad Co., 305 U. S. 177, 182; Opp Cotton Mills v. Administrator, 312 U. S. 126, 152-153; Power Commission v. Pipeline Co., 315 U. S. 575, 583-584; Amalgamated Workers v. Edison Co., 309 U. S. 261, 265.

The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden." *Edwards* v. *United States*, 312 U. S. 473.

To sum the matter up insofar as the decisions involving collateral attack of administrative judgments are concerned it is sufficient to say that the judgments of the courts are subject to the same scrutiny as are the orders of the administrative agencies. Therefore what this court said in *Eagles* v. *United States*, 67 S. Ct. 313, is applicable here. There it is said: "It is elementary that habeas corpus may not be used as a writ of error. *United States* ex rel. *Tisi* v. *Tod*, 264 U. S. 131; *Woolsey* v. *Best*, 299 U. S. 1. The function of habeas corpus is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *United States* ex rel. *Tisi* v. *Tod*, supra. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson* v. *Zerbst*, 304 U. S. 458; *Bridges* v. *Wixon*, 326 U. S. 135, 149."

There can be no question that the procedural irregularities upon the trial of the prisoners in the convicting courts were of such a nature or magnitude as to render the trials of the petitioners very unfair. Indeed the trials were violative of every fundamental safeguard of a full and fair hearing that are provided for in the Constitution.

Even assuming, *arguendo*, that prisoners had the opportunity of raising these objections by direct appeal to the circuit courts of appeals, yet they would not be precluded from raising constitutional questions upon petitions for writs of habeas corpus. Since the constitutional objections urged in the petition are so fundamental and of such great

magnitude, they cannot be waived by failure to appeal even if prisoners were represented by counsel. If the questions are such a nature that they can be considered on petitions for writs of habeas corpus, they cannot be waived even if the prisoners had failed to appeal. *Screws* v. *United States*, 326 U. S. 91.

It should be remembered that prisoners claim that the Act and Regulations, as construed and applied to them upon their trials in the criminal cases, are unconstitutional and void. It has heretofore been shown that the Act and Regulations, as construed and applied to deny prisoners a judicial trial are unconstitutional. It is fundamental that the writ of habeas corpus is available to determine the constitutionality of an act under which one is imprisoned. This Court in Ex parte *Siebold*, 100 U. S. 371, said:

"The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If the position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitions

arose solely upon these laws." (Ex parte *Siebold*, 100 U. S. 371, 376).

There is no difference between the unconstitutionality of the law on its face and as construed and applied. While there is a distinction between the two, it is a distinction without a difference. In the case of a law unconstitutional on its face, when it comes from the legislature, no jurisdiction or authority whatever is conferred upon the court that invokes the law as a basis for jurisdiction of the proceedings before it. In the case of a valid law, unconstitutionally construed and applied by the court that assumed jurisdiction under the valid law, the jurisdiction or authority is lost when the unconstitutional interpretation and construction is applied upon the legislation by the court. So if a court acquires no jurisdiction of a law void on its face, of necessity it must lose jurisdiction under a law that becomes unconstitutional as construed and applied.

In *Johnson* v. *Zerbst*, 304 U. S. 458, 467, 468, this Court announced a principle and made a holding that is a precedent for the action petitioners request here. In that decision it is said:

". . . Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in *Mooney* v. *Holohan*, 294 U. S. 103, 113—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice.

"A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied

with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.'" See also *Williams* v. *Kaiser,* 323 U. S. 471, 477; *Bowen* v. *Johnston,* 306 U. S. 19, 23-25.

Similarly in *Waley* v. *Johnston,* 316 U. S. 101, the court extended the writ and broadened its scope in order to permit a full inquiry into facts entirely *de hors* the record to show the illegality of a plea of guilty, thus placing the plea on the same footing as a confession obtained in the same manner by force and duress. It was said: "In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (pp. 104-105) *.

Inasmuch as the judgments of conviction in these cases were not rendered by a state court but are by federal courts, the cogent reasons against interference with administration of justice in the state courts by habeas corpus in the federal courts are wholly inapplicable here. Ex parte *Royal,* 117 U. S. 254; In re *Lincoln,* 202 U. S. 178, 182; *Stevens* v. *McClaughry,* 297 F. 18 (CCA-8).

*. For a further discussion of the right to challenge judgments of conviction collaterally through habeas corpus in federal courts, the Court is referred to certain law review articles. 25 Boston U. L. Rev. 26-27; 40 Col. L. Rev. 535-537, 1006, 1028-1029.

It is clear that the prisoners have strongly overcome the presumption of regularity of the trials and proceedings under the indictments. It appears from the allegations and proof that the indictments, the judgments and commitments were void and that the district courts trying the indictments lost jurisdiction through illegal denial of the right to attack the draft board orders which was a gross violation of their constitutional rights.

The decisions in *United States ex rel. Lohrberg* v. *Nicholson* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 744), *United States ex rel. Falbo* v. *Kennedy* (CCA-4) 141 F. 2d 689 (certiorari denied 322 U. S. 745), and *United States ex rel. Arpaia* v. *Alexander* (CCA-2) 146 F. 2d 847 *, are not apposite. In each of those cases the prisoner had not completed the selective process. The failure of each to report for and submit to a preinduction physical examination prevented the armed forces from determining whether he was acceptable for training and service through the screening process. None of those registrants had reached the point in the administrative process which qualified them to challenge the legality of the administrative orders.

Since the prisoners here had completed the selective process (upon reporting for and being accepted on a preinduction physical examination by the armed forces, as well as their acceptance upon going through the induction process when they reported in response to the order for induction to exhaust their administrative remedies) they are in position to challenge the administrative orders in defense to the indictments charging them with refusal to submit to induction. The denial of this right by the convicting courts entitles them to discharge on habeas corpus.

Mr. Justice Douglas, speaking for the Court in *Estep* v. *United States* (327 U. S. 114) recognizes that there

* See Note 17 of the majority opinion written by Mr. Justice Douglas in Estep v. United States, 327 U. S. 114.

is a distinction between the situation presented in the *Lohrberg, Falbo* and *Arpaia* cases, supra, and that presented upon a petition for habeas corpus where the prisoner had exhausted the selective process. In footnote 17 of the *Estep* opinion (pp. 428-429) he declares that, "It is true that after the conviction of the defendant in the *Falbo* case, his petition for a writ of habeas corpus was denied. *United States ex rel. Falbo* v. *Kennedy*, 4 Cir., 141 F. 2d 689. And in a like situation habeas corpus was denied in advance of the trial. *Albert* v. *Goguen*, 1 Cir., 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of habeas corpus followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See *Bowen* v. *Johnston*, 306 U. S. 19, 59 S. Ct. 442, 83 L. Ed. 455; *Ex parte Williams*, 317 U. S. 604, 63 S. Ct. 431, 87 L. Ed. 491; *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end."

In prisoners' cases here no additional steps in the selective process remained to be taken. There was no other "corrective procedure" available to prisoners "which might have afforded relief from the orders complained of." They pursued the selective process to the very end as did Estep in the case of *Estep* v. *United States*, 327 U. S. 114.

The Government relies upon *Collins* v. *Johnston*, 237 U. S. 502, 507. That decision can be distinguished. The facts in that case are somewhat different from the facts in the cases at bar. There the prisoner was held under a judgment of a state court convicting him of perjury. Upon the trial of his perjury charge evidence was rejected because it was considered insufficient. In that case the convicting court did not hold that the defense was immaterial or that the prisoner had no defense against the indictment.

The rejection of the evidence in that case is very much like the rejection of evidence on self-defense offered in a murder case where the ground of rejection was that the evidence was insufficient.

Here the entire defense and issue of whether the draft boards' orders were invalid were excluded from the entire cases, it being held that there was no such defense available in the law.

The ruling of the convicting courts in the cases at bar is very much like a ruling of a district judge in a murder trial where it is held as a matter of law that self-defense is not available as a defense to a murder charge, thereby completely rejecting as immaterial the prisoner's defense. In such a case, there would be a denial of a constitutional right, as was conceded by the United States Attorney before the trial court in the *Sunal* case.*

Furthermore the *Collins* v. *Johnston* case can be distinguished because there the prisoner had raised the same contentions in a petition for writ of habeas corpus before the Supreme Court of California as well as upon a direct appeal from the conviction to the Supreme Court of California and thence to this Court. See *Collins* v. *O'Neil*, 214 U. S. 113. Furthermore, this Court found that there was no

* "THE COURT: What about Mr. Covington's analogy between this case and a case, for example, where a man is accused of having committed a murder and is not permitted to introduce any evidence of self-defense?

MR. GIVEN: Your honor, I think that the question there is, on that type of case, that the Court ousts its jurisdiction when it fails to grant the defendant his constitutional right, which is granted to him by the Constitution. Now, that is probably illustrated more clearly where the defendant is denied the right of attorney.

THE COURT: Well, we can see that those cases are exceptions to the rule because the Constitution, itself, in its terms gives him certain rights and if those rights are denied him at the trial, furnishes the basis for writ of habeas corpus after conviction but the right, here, is based on denial of due process and Mr. Covington argues that it is analagous to a case where the charge is murder and the defendant wishes to introduce a defense of self-defense and the court refuses to permit that defense to be made and instructs the jury that it cannot be made." [84-85]

merit whatever to the defense offered. Here this Court has held that the tendered defenses were valid. *Estep* v. *United States*, 327 U. S. 114. It should be remembered that what was involved in that case was a question of state procedure and the decision of the Supreme Court of California was binding upon this Court that the defense proffered was not a good one in defense to the indictment. Also *Collins* v. *Johnston* has been materially impaired by this Court's decision in later cases.*

Attention is called to *Rea* v. *McDonald* (CCA-5) 153 F. 2d 190, certiorari denied 66 S. Ct. 820, rehearing denied 66 S. Ct. 959. The decision in the *Rea* case conflicts with the decisions of the courts below on the availability of the writ of habeas corpus because of the extraordinary circumstances. Insofar as it affirmed the judgment dismissing the petition for the writ, which contained allegations identical to those in the petitions in these cases, the decision conflicts with the decision of the court of appeals in the *Kulick* case. The denial of certiorari does not import that this Court approved the decision of the court of appeals in the *Rea* case. In *House* v. *Mayo*, 324 U. S. 42, this Court said:

"The district court also referred to a denial by this court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo*, 322 U. S. 710, 64 S. Ct. 1058. The district court thought that this was an expression of the opinion that no meritorious question is presented by the matters of which petitioner here complains. But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the

* Waley v. Johnston, 316 U. S. 101; Holiday v. Johnston, 313 U. S. 342; Walker v. Johnston, 312 U. S. 275; Bowen v. Johnston, 306 U. S. 10; Johnson v. Zerbst, 304 U. S. 458; Mooney v. Holohan, 294 U. S. 103, 113; Cf. in this connection *Ex parte* Hans Nielsen, 131 U. S. 176, overruling *sub silentio Ex parte* Bigelow, 113 U. S. 328, as declared by the United States Court of Appeals for the District of Columbia in Clawans v. Rives, 104 F. 2d 240, 244.

merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. Ed. 629; *State of Ohio ex rel. Seney* v. *Swift & Co.,* 260 U. S. 146, 151, 43 S. Ct. 22, 24, 67 L. Ed. 176; *United States* v. *Carver,* 260 U. S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361; *Atlantic Coast L. Ry.* v. *Powe,* 283 U. S. 401, 403, 404, 51 S. Ct. 489, 499, 75 L. Ed. 1142. . . .

"The decision of the district court is thus not supported by the grounds assigned for it, and should have been reversed by the court of appeals. And the judges of that court erred in not considering whether the case was an appropriate one for a certificate of probable cause, as they were authorized to do by 28 U. S. C. sec. 466, 28 U. S. C. A. sec. 466. We think that they also erred in not issuing the certificate." (*Ibid.* 521)

In further support of the fact that the denial of certiorari in the *Rea* case, *supra,* should not be accepted as ground for denial of the questions presented here, it should be observed that the questions presented in the cases of *Estep* v. *United States,* and *Smith* v. *United States,* 327 U. S. 114, were previously presented to the court in *Rinko* v. *United States,* 147 F. 2d 1. Petition for certiorari was denied, 325 U. S. 851, rehearing denied, 325 U. S. 894. See also note 15 of the majority opinion in *Estep* v. *United States.*

The petition for writ of certiorari in the *Rea* case, *supra,* was probably denied because of the grounds contained in the trial court's judgment, whereby it was found by the trial court that the petitioner Rea had waived his constitutional rights in the convicting court by failure to object to the rulings and actions of the convicting court.

## TWO

**Extraordinary and unusual circumstances in the law existed at the time of the convictions of these prisoners in these cases, justifying their failure to appeal and warranting their use of the writs of habeas corpus as a substitute for appeal, to review the unconstitutional denial of the defenses in the criminal trials of the prisoners.**

In the first prosecutions under Section 11 of the Selective Training and Service Act of 1940 practically all of the judges of the district courts and all of the circuit courts of appeals except one held that the legality of an order of a draft board commanding a registrant to report for service could not be challenged in defense to the indictments.*

Following the decision of this Court in *Falbo* v. *United States*, 320 U. S. 549, as a result of an erroneous interpretation and construction of the Court's opinion in that case, all of the circuit courts of appeals and all of the district courts held that this Court, by the *Falbo* decision, had approved the holding of the courts that there could be no judicial review of a draft board order in prosecutions under Section 11 of the Act.

* The only court of appeals holding that the defense was available was the fourth circuit. Goff v. United States, 135 F. 2d 610; Honaker v. United States, 135 F. 2d 683. See also Johnson v. United States (CCA 8) 126 F. 2d 242, 247.

All such courts continued to hold that the only way that relief could be obtained from an illegal order was for the complaining registrant to submit to induction and thereafter seek review by writ of habeas corpus.* Even in situations where the selective process was completely terminated and the registrant was charged with refusal to submit to induction or with failure to remain at a civilian public service camp, the courts persisted in denying judicial review. *Smith* v. *United States* (CCA-4) 148 F. 2d 288; *Estep* v. *United States* (CCA-3) 150 F. 2d 768; *United States* v. *Rinko* (CCA-7) 147 2d 1; *Gibson* v. *United States* (CCA-8) 149 F. 2d 751. For almost two years follwoing the decision of this Court in *Falbo* v. *United States*, various petitions for writs of certiorari were submitted to this Court asking the Court to take jurisdiction and clarify the law as to when, where and how one charged with refusal to comply with the draft board orders could challenge such orders in defense to the indictment brought under Sec.

* Sirski *v.* United States (CCA-1) 145 F. 2d 749; United States *v.* Flakowicz (CCA-2) 146 F. 2d 874; United States *v.* Estep (CCA-3) 150 F. 2d 768; Smith *v.* United States (CCA-4) 148 F. 2d 288; Koch *v.* United States (CCA-4) 150 F. 2d 762; Fletcher *v.* United States (CCA-5) 129 F. 2d 262; Klopp *v.* United States (CCA-6) 148 F. 2d 659; United States *v.* Rinko (CCA-7) 147 F. 2d 1; Gibson *v.* United States (CCA-8) 149 F. 2d 751. These cases are taken from Mr. Justice Frankfurter's concurring opinion in Estep *v.* United States 327 U. S. 114, 66 S. Ct. 423, 435. See also note 2 thereof where the following additional cases are referred to: United States *v.* Kauten (CCA-2) 133 F. 2d 703; United States *v.* Nelson (CCA-2) 143 F. 2d 584; United States *v.* Grieme (CCA-3) 128 F. 2d 811; United States *v.* Bowles (CCA-3) 131 F. 2d 818; Goodrich *v.* United States (CCA-5) 146 F. 2d 265; United States *v.* Mroz (CCA-7) 136 F. 2d 221; United States *v.* Messersmith (CCA-7) 138 F. 2d 599; United States *v.* Daily (CCA-7) 139 F. 2d 7; United States *v.* Sauler (CCA-7) 139 F. 2d 173; United States *v.* Van Den Berg (CCA-7) 139 F. 2d 654; United States *v.* Fratrick (CCA-7) 140 F. 2d 5; United States *v.* Baxter (CCA-7) 141 F. 2d 359; United States *v.* Domres (CCA-7) 142 F. 2d 477; Bronemann *v.* United States (CCA-8) 138 F. 2d 333; Van Bibber *v.* United States (CCA-8) 151 F. 2d 444. See also Springer *v.* United States (CCA-9) 148 F. 2d 411 and Swingle *v.* United States (CCA-10) 151 F. 2d 512. About a hundred additional opinions of all the circuits could be added to this note.

tion 11 of the Act.* Even in two cases where the administrative remedies were completely exhausted the Court denied certiorari. *United States* v. *Flakowicz* (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851; *United States* v. *Rinko* (CCA-7) 147 F. 2d 1, certiorari denied 325 U. S. 851, rehearing denied 325 U. S. 894.

The effect of this growing mountain of erroneous unconstitutional statutory construction by the district courts and the circuit courts of appeals gave no grounds for Sunal or Kulick to believe, or that there would be any reason to suppose, that the courts of appeals would hear them sympathetically or rule in their favor or even that this Court would grant certiorari. The time for taking appeals by Sunal and Kulick had expired long before this Court granted certiorari in the *Smith* case on May 28, 1945, 325 U. S. 846, and the *Estep* case on October 8, 1945, 326 U. S. 703. In fact they could not be certain of the possibility of success upon appeal until this Court had decided that draft board orders could be challenged in defense to the indictment in the *Smith* and *Estep* cases on February 4, 1946, 327 U. S. 114.

A misinterpretation of this Court's decision in the *Falbo* case had "silenced whatever doubts may theretofore have been held by a few of the judges". (See concurring opinion by Mr. Justice Frankfurter in *Estep* v. *United States*, 327 U. S. 114, 66 S. Ct. 423, 435.) This uniformly accepted misinterpretation provided reasonable grounds to excuse Sunal and Kulick from appealing the judgments of conviction in their cases.

* United States *v.* Flakowicz (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851; United States *v.* Parsons (CCA-2) 146 F. 2d 874, certiorari denied 325 U. S. 851; Grieme *v.* United States (CCA-3) 141 F. 2d 495, certiorari denied 322 U. S. 744; Clayton *v.* United States (CCA-4) 141 F. 2d 494, certiorari denied 322 U. S. 745; Stull *v.* United States (CCA-4) 141 F. 2d 494, certiorari denied 322 U. S. 745; United States *v.* Rinko (CCA-7) 147 F. 2d 1, certiorari denied 325 U. S. 851, rehearing denied 325 U. S. 894.

Under this extraordinary circumstance the district judge and the circuit court of appeals in the *Kulick* case [54-56, 83-85] and the court of appeals in the *Sunal* case [104-108] properly concluded that extraordinary circumstances existed justifying the prisoners in not appealing and in resorting to the writ of habeas corpus in lieu of appeal after the obliteration of the mountain of erroneous interpretations of this Court's *Falbo* decision by circuit courts of appeals and the district courts.

This is an extraordinary circumstance very similar to that involved in *Bowen v. Johnston*, 306 U. S. 10. There the Chief Justice declared that the rule concerning the writ of habeas corpus not being a substitute for appeal or writ of certiorari "is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (306 U. S. 10, 27)

The extraordinary circumstance of the lower courts misinterpreting the law should not be considered that the prisoners here are of the opinion that the construction placed upon the Act was approved by this Court. Indeed the interpretation was not approved by the denial of certiorari. The denial of certiorari in all of the cases in which the erroneous interpretations were declared by the courts does not mean that the Court approved the statements in those cases. Indeed in most of the cases in which petitions for writs of certiorari were denied the administrative remedies had not been exhausted by reason of the failure of the registrants to complete the selective process. Therefore the statements by the inferior federal courts about the requirement that the registrant must first submit to induction as a condition precedent to judicial review by habeas corpus as the only remedy were dicta. Accordingly the denial of certiorari in those cases does not mean that there the construction of the Act by the lower courts had been approved by this Court.

The predicament into which the prisoners had been put by the uniformly erroneous interpretation of the Act and Regulations was an extraordinary circumstance which should justify the granting of the writ of habeas corpus to review the proceedings in the convicting court. But this extraordinary circumstance resulting from these holdings should not be considered as a final interpretation of the Act and Regulations. Indeed the erroneous interpretation was *ultra vires* and was no interpretation at all until adopted by this Court. In the circumstance no reasonable person could have been required to resort to appeal irrespective of how certain he was that the courts of the country were wrong. No reasonable person could suppose that the federal courts would change their minds. That this Court would grant certiorari was almost equally dark and hopeless when these prisoners were tried.

In a galaxy of cases involving varying circumstances, where constitutional rights have been denied prisoners upon their criminal trials, this Court has approved judicial review of the convictions on habeas corpus even though the same questions raised could have been urged upon appeal, writ of error or certiorari but which remedies were waived and not resorted to for one reason or another.

In Ex parte *Hans Nielsen*, 131 U. S. 176, a demurrer was wrongfully sustained to the prisoner's plea of former jeopardy made upon his former criminal trial. Failing to take an appeal from his second conviction he sought habeas corpus review of the erroneous denial of his plea of former jeopardy. "On appeal to the Supreme Court it was urged by the Solicitor General on behalf of the United States that the petition did not show want of jurisdiction, and that if the judgments of the court in sustaining the demurrer in the second criminal case was wrong it was an error which might render the judgment voidable, but not void for want of power, and that therefore the writ of habeas corpus would not lie because that writ should not be converted into

a mere writ of error." (*Clawans* v. *Rives*, 104 F. 240, 244, U. S. Court of Appeals for the District of Columbia, speaking of Ex parte *Hans Nielsen*, 131 U. S. 176)

This Court, in Ex parte *Hans Nielsen*, 131 U. S. 176, 184, 185, said: "A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner, . . . In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *Jones* v. *Kentucky* (CCA-6) 97 F. 2d 335, it was held that the erroneous reception into evidence of a confession obtained by force and violence contrary to the due process clause which could have been complained of on a direct appeal was ground for discharge upon writ of habeas corpus.

In other cases it has been held that where a trial was dominated by mob violence, which could have been presented to the trial court by motion for new trial and raised upon appeal, the writ of habeas corpus was available to determine the legality of the prisoner's custody. *Frank* v. *Mangum*, 237 U. S. 309, 330-331, 335-345; cf. *Moore* v. *Dempsey*, 261 U. S. 86, 91.

One put to trial for a felony by an information, contrary to the Constitution, instead of an indictment can raise the error of constitutional law upon a direct appeal. Also the amendment of an indictment by the prosecutor without a return to the grand jury can be complained of upon appeal. Nevertheless in situations like this where no appeals were taken the Court has held that these errors of law can be determined upon habeas corpus, in ascertaining whether or not the custody of the prisoner is illegal. Ex parte *Wilson*, 114 U. S. 417; Ex parte *Bain*, 121 U. S. 1.

Also the denial of trial by jury can be reserved easily and raised upon an appeal. Nevertheless where no appeal was taken the denial of this constitutional right has been

held to be ground for discharge upon habeas corpus. *Callan* v. *Wilson*, 127 U. S. 540.

Regardless of whether there has been an appeal or failure to raise the question upon appeal prisoners who illegally have been denied the assistance of counsel upon their criminal trials have been held entitled to the writ of habeas corpus. *Johnson* v. *Zerbst*, 304 U. S. 458, 463, 468; *Walker* v. *Johnston*, 312 U. S. 275.

*Price* v. *Johnston*, 125 F. 2d 806 (CCA-9) certiorari denied, 316 U. S. 677, and other cases of similar tenor are not applicable here. In that case the evidence received, although illegal, did not constitute a violation of the express provisions of the Constitution as here. Cf. *Jones* v. *Kentucky*, 97 F. 2d 335 (CCA-6). There is a vast distinction between an erroneous ruling on evidence which is received and the exclusion of all evidence in reference to a certain defense because the court illegally held there is no such defense in law as in the cases at bar. The exclusion of "impressive evidence" of insanity, denial of compulsory subpoena process, failure to give proper instructions, denial of a motion for new trial, newly discovered disqualification of jurors, and a defective verdict are points involved in the other cases relied upon by the Government in these cases.* None of these situations are in point, and none of them involved a deprivation of a right expressly guaranteed by the Constitution and which was serious. Here there was a denial of a fundamental right of self-defense in court.

Furthermore the line of cases relied upon by the Government cited here in the above footnote has become materially impaired by the later decisions of this Court which have

* Andrews v. Swartz, 156 U. S. 272; In Matter of Moran, 203 U. S. 96; Harlan v. McGourin, 218 U. S. 442; Charlton v. Kelly, 229 U. S. 447; *Ex parte* Harding, 120 U. S. 782; Valentine v. Mercer, 201 U. S. 131; McMicking v. Shields, 238 U. S. 99; Kaize v. Henry, 211 U. S. 146; *In re* Eckart, 166 U. S. 481; Felts v. Murphy, 201 U. S. 123.

followed the doctrine announced by Mr. Justice Holmes in his dissenting opinion in *Frank* v. *Mangum*, 237 U. S. 309, 346. The decisions relied upon by the Government have been materially weakened, if not destroyed, by the later decisions which have declared the writ of habeas corpus to be expanded rather than narrowed.

In cases where the rights have been attempted to be raised in criminal proceedings without success because of failure to preserve the question upon appeal or other technical difficulties, it has been held that the writ of habeas corpus in the federal courts is available to review convictions, even by state courts. *United States* ex rel. *Murphy* v. *Warden of Clinton Prison* (DC NY 1939) 29 F. Supp. 486.*

"Habeas corpus represents . . . a last line defense. Apparently in opposition to this remedy is much quoted dogma that habeas corpus is no substitute for appeal as of right, but this is enunciated where appeal is still available, and hence is not apposite in this situation. Supreme Court decisions give some indication that the writ will not issue where an appeal as of right was available, but not tried, and is now unavailable, but in the only clear case on that point the equities of the situation are not with petitioner. . . .

"When . . . habeas corpus is used when no other remedies exist, and particularly after an available review by the United States Supreme Court has been lost by inadvertence, most of the force of the above argument is lost. Counsel would not purposely forego the certainty of an immediate review on the merits by the Supreme Court for the uncertainty of a decision by a single district judge and the possibility that no appeal therefrom would be allowed. Hence it seems unlikely that this procedure would be deliberately resorted to as a means of delay. It would in no

* This case was affirmed *sub nom.* United States *ex rel.* Murphy v. Murphy, Warden (CCA-2) 108 F. 2d 861, certiorari denied *sub nom.* Murphy v. Warden of Clinton Prison, 309 U. S. 661

event entail an additional burden on the Supreme Court, and since counsel would not prefer this procedure, it seems that there would be too few of these cases to cause calendar congestion in the lower courts. The only remaining policy argument against granting the writ . . . is the inadvisability of giving a single district judge power to overturn a decision of the highest court of a state. But the validity of this argument loses force when it appears that the remedy is the only one existing. Indeed, the courts have indicated that a hearing on the merits outweighs this consideration by granting habeas corpus where no appeal as of right, but only certiorari, is available."

"Constitutional rights should not be denied for want of a remedy in the absence of compelling policy considerations to the contrary. It is submitted that when an appeal as of right to the United States Supreme Court existed, but because of counsel's error never materialized and is no longer available, the federal courts should inquire into possible violations of constitutional rights on habeas corpus." (40 COL. L. REV. 535, 537, 539-540).

The extraordinary situation of this Court's clarifying the uniform, nation-wide misunderstanding and erroneous interpretation of the Selective Training and Service Act by the lower courts is not to be likened unto a situation where there has been a reversal by this Court of one of its former decisions involving statutory construction. In *Warring* v. *Colpoys* (U.S. App. D.C.) 122 F. 2d 642, the court had before it a writ of habeas corpus involving a prisoner who had been convicted and jailed for contempt of court ensuing the prisoner's attempt to bribe a jury sitting in a case pending before the court. The bribery attempt occurred outside of the court. At the time of the conviction *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, declaring such acts to be contempt of court was in effect. After the prisoner had been incarcerated for some time this Court, in *Nye* v. *United States*, 313 U. S. 33, reversed

its holding in the *Toledo Newspaper Company* case. The court of appeals, in the *Warring* case, held that the change in statutory construction did not entitle the prisoner to a discharge on writ of habeas corpus, and certiorari was denied, 314 U. S. 678.

The change of the construction of the statute involved in the *Warring* v. *Colpoys* case was entirely different from the reversal by this Court of the erroneous interpretation placed upon the statute by the lower courts in the *Estep* and *Gibson* cases. Upon the facts involved in the contempt case reviewed in the *Warring* it was concluded that the facts constituted contempt and upon this conclusion the prisoner pleaded guilty upon the trial and was sentenced. There was involved a mere error of law by the convicting court as to whether upon all the facts adduced the prisoner was guilty. In the *Warring* case the contention was that the undisputed facts alleged and proved showed that the prisoner was not guilty of contempt. Therefore the contention would be very similar to the case where in habeas corpus proceedings the prisoner contends that there is no evidence to support his conviction. This is an entirely different situation from the facts of the case at bar. Here the contention is made that the denial of the right to be heard as to a defense was a violation of the constitutional rights of the prisoner. In the *Warring* there was no denial of a right to be heard. If in the *Warring* case the prisoner had been denied the right to offer any evidence in his behalf then the situation would be different.

The decision of this Court in *Estep* v. *United States*, 327 U. S. 114, was not a reversal of the doctrine declared by this Court's decision in *Falbo* v. *United States*, 320 U. S. 549. (*Gibson* v. *United States*, 67 S. Ct. 301, December 23, 1946) The fact that this Court, in the *Smith*, *Estep*, *Gibson* and *Dodez* cases held that when draftees have completed the selective process they are in a position to challenge the indictment without taking further steps in compliance with

the order merely reversed the holdings of the inferior courts to the contrary in other cases. The decisions and holdings of the courts of appeals and the district courts construing the Act, resulting in the illegal convictions of Kulick and Sunal, is not analagous to this Court's reversal of the *Toledo* case (247 U. S. 402) by its decision in the *Nye* case (313 U. S. 33). The reason for this is that the erroneous construction and misinterpretation of the Act by the lower courts here are entirely *ultra vires*. An act of Congress cannot be said to have any established meaning until construed and interpreted by this Court. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499. The full meaning of Section 11 of the Act did not become known until *Estep* v. *United States*, 327 U. S. 114. In fact in the cases at bar there has never been any change in the construction placed upon the Selective Training and Service Act by this Court.

The fact that the erroneous construction placed upon the Act in the dictum in scores of decisions by the lower federal courts was uniformly accepted by the bench and bar does not make it a construction of the statute of such character to deprive prisoners of their rights. Ignorance of the law is no excuse for parties to actions violating the law. Ignorance of the law is no excuse for the violation of parties' rights by judges of the courts. An unconstitutional construction of a statute and ruling by a judge is *per se* unlawful. The good faith belief of the judge does not make it any the less lawful. Certainly it is not necessary to prove that the judges acted in bad faith in construing the statute in order to prove that the prisoners were deprived of their constitutional right to a judicial trial.

As has been heretofore pointed out the construction of the courts and the almost uniform opinion of the bar as to the meaning of the Act was not binding on Congress. The imputation which they made to Congress was declared to be wrong by this Court in the *Estep* and *Gibson* cases.

Hence the interpretation put on the statute by the lower courts and most of the lawyers was not a statutory construction of the dignity and strength as that involved in *Warring* v. *Colpoys*, 122 F. 2d 642 (U.S. App. D.C.). The Act really had no meaning as to when, where and how a registrant could attack a draft board order in court until this Court spoke in the *Estep* and *Gibson* cases completing the interpretation that began in the *Falbo* decision by this Court.

The prisoners here concede that the convicting courts, not only had the authority, but had the duty of construing the statute in the same manner as did this Court. Those courts were called upon to properly construe the statute. They arbitrarily exercised the power and construed the statute in an unconstitutional manner. While a court may have the power to construe a statute, yet if, in exercising that power, it construes a statute in an unconstitutional manner or interprets it so as to deprive an accused person of his constitutional rights such illegal construction or ruling cannot be held to be a mere error of law purely because the court had the right to decide the question submitted. The speciousness of the argument is best demonstrated through an analogy. Every court has authority to decide whether it has jurisdiction. Now suppose a court has before it an action which is beyond its jurisdiction. Would a decision by such court that it had jurisdiction deprive a habeas corpus court of going into the matter on collateral attack? Certainly not. Then by force of the same reason the authority of the convicting courts to construe the statute does not preclude this court on habeas corpus to determine that the convicting court illegally and unconstitutionally exercised the power of construing the statute.

The holding in *Warring* v. *Colpoys*, 122 F. 2d 642, cannot be taken as an authority governing the situation presented here. In the *Warring* case there was no constitutional objection made. In the cases at bar the prisoners complained

that they were deprived of their defenses contrary to the due process clause and the bill of attainder clause of the Constitution. The holding in *Hovey* v. *Elliott*, 167 U. S. 409, is applicable here instead of the *Warring* decision. The Constitution being the real law (supreme over the interpretation of all courts), the unconstitutional construction placed upon the Act and Regulations by the inferior federal courts is not binding against this Court or the prisoners here. This is so even though it might be considered that the decisions of this Court in the *Smith*, *Estep*, *Gibson* and *Dodez* cases change the statutory construction of the Act and Regulations in a manner similar to that presented in the *Warring* case.

## THREE

**The scope of inquiry on the disposition of the writs of habeas corpus in these cases properly ought to extend to a determination of the validity of the draft board proceedings only in event this court concludes that the illegality of the proceedings in the convicting courts is not sufficient to justify a discharge of the prisoners.**

It is true that the petitions for writs of habeas corpus in both of these cases attack the validity of the judgments of conviction on two grounds. The first line of attack against the judgments was that the judgments were void because of the trial courts' denying the prisoners their rights of procedural due process upon the criminal trials. The second line of attack against the judgments was that the judgments were void because the draft board orders on which the indictments were based are in excess of the jurisdiction of the draft boards because made without basis in fact and in violation of the registrants' rights of procedural due process.

Upon the hearing of the writs of habeas corpus in the district courts, and upon the argument and submission of the appeals in the courts below, the prisoners have contended that orderly procedure and due process of law in habeas corpus proceedings in these cases did not require the habeas corpus courts to review *de novo* the draft board proceedings. This was upon the assumption that if the conclusion was reached that the district courts denied the prisoners their constitutional rights upon the trial of their indictments it would not be necessary to go into the draft board proceedings. In other words, it has been the view of prisoners that although they attack the judgments of conviction on two grounds, if they are successful on the first ground it is unnecessary for the Court to pass upon the second ground.

Ordinary procedure, therefore, requires the Court in habeas corpus to avoid decision of unnecessary questions. Accordingly it will be unnecessary to decide whether the draft board orders are invalid in these proceedings if the conclusion is reached that the convicting courts violated prisoners' rights by refusing to consider the illegality of the draft board orders upon their defense against the indictments. However, in event the Court does not conclude that the denial of the right to make the defense is a denial of a constitutional right, then it will be necessary to consider the validity of the draft board orders.

In the petitions for writs of habeas corpus, and in their briefs filed in the courts of appeals below, the prisoners attacked the validity of the draft board orders. Upon the hearing of the writs of habeas corpus and in presentation of these cases to the courts of appeals the Government took the position that the scope of inquiry in these habeas corpus proceedings, if allowed at all, should be restricted to a *de novo* review of the draft board proceedings. The Government has repeatedly argued that, if it is found that the draft boards did not violate any rights of the prisoners,

it would be the duty of the habeas corpus court to hold that the detention of the prisoners was legal, irrespective of a finding that the convicting courts denied the prisoners their rights to challenge the validity of the orders in their defense against the indictments. In other words, the Government urged in the courts below that if the draft boards violated no rights of the prisoners then the violation of the prisoners' rights by the convicting courts was harmless error and wholly immaterial.

Upon its presentation of the issues to this Court the Government has materially altered its position taken in the courts below as to the procedure to be followed in these cases and as to the scope of review. The Government has now taken the view that the habeas corpus courts can inquire as to whether there was a denial of a constitutional right by the convicting courts of such a magnitude as to make the judgments of conviction void. In addition, the Government now suggests to the Court a slight variation of its original position on the scope of review. The Government now says that the request of the prisoners in their petitions for writs of habeas corpus to go behind the judgments of conviction and review the draft board proceedings is a novel one which is not supported by any authority. This is contrary to the view taken by the Government in the courts below. Then the Government further urges the position it has taken in the courts below, which is that upon the dictum of the decision in *Estep* v. *United States*, 327 U. S. 114, the writ of habeas corpus after conviction is available to inquire into the validity of the draft board proceedings.

This position of the Government on the scope of review in these cases is somewhat equivocal and vague. It is difficult for the prisoners in these cases, in view of the position taken in the courts below by the Government, to decide precisely just what is the Government's position now upon the scope of inquiry in these habeas corpus proceedings.

The trial courts in both these cases and the circuit court of appeals in the *Sunal* case were somewhat misled by the Government's argument in those courts as to the scope of review. They believed that if the draft boards violated no right of the prisoners the denial of the right to challenge the draft board orders in the criminal trials was harmless error.

The Second Circuit Court of Appeals in the *Kulick* case did not reach the question of the validity of the draft board order in that case because it concluded that Kulick had been unlawfully denied his right to be heard in the criminal trial in the convicting court. On this basis the court ordered him discharged. The prisoners in these cases are of the opinion that ordinary proceedings in habeas corpus cases and due process of law in habeas corpus cases approve the disposition that was made of Kulick by the court of appeals below. Prisoners suggest that both prisoners in these cases be disposed of by this Court in the same manner that the court below disposed of Kulick.

The prisoners here believe that the doctrine approved by the trial courts in these cases and the court of appeals in the *Sunal* case to the effect that denial of the right to challenge the draft board orders becomes harmless error when, upon a *de novo* review of the draft board proceedings, it is found that the draft board order is valid is wrong.

The argument of the courts that reached this conclusion in these cases is based upon two points urged to them by the Government in these cases. So as to aid the Court in escaping the erroneous conclusion to which those courts were driven by the Government, the prisoners here will discuss the two points urged by counsel for the wardens upon the courts below.

The first point, no prejudicial error was committed against the prisoners when the defenses were ruled out as immaterial because the draft boards acted legally, begs the

question. If there was denial of the right to be heard in their defenses, it would be a denial of due process of law. This denial cannot be cured by the holding of the habeas corpus courts that there was basis in fact for the finding that prisoners are not ministers of religion.

Suppose the convicting courts had denied prisoners the right to counsel. Suppose the courts put them to trial upon informations rather than indictments. Suppose the courts erroneously overruled pleas of former jeopardy. Suppose prisoners were convicted upon confessions illegally obtained, contrary to the Constitution. Can it be reasonably said that such denials could be cured by a finding of the habeas corpus courts that prisoners had no good defense to the indictments because their draft board files showed that they were not ministers of religion and were therefore guilty of having failed to submit to induction? Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because there was a basis in fact for the draft board orders or that they are guilty? The mere asking of the questions answers with a resounding no.

If prisoners were denied judicial trials and due process of law, as they claim, then there is only one method whereby that denial can be cured. That is to discharge the prisoners without prejudice to the rights of the Government to reindict or retry them so that upon another trial they will have opportunity to make their defenses, as the court of appeals held in the *Kulick* case. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the prisoners are admittedly guilty, as the court below held in the *Sunal* case.

The position here taken that the loss of jurisdiction by the convicting courts cannot be restored by anything that

the habeas corpus courts may find about the validity of the administrative proceedings is supported by the views of Mr. Justice Holmes, expressed in *Frank* v. *Mangum*, 237 U. S. 309, 348. In his dissenting opinion there he said: "If the petition disclosed facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above." (237 U. S. 348)

The efforts of the courts below in the *Sunal* case to hold that the action of the convicting court in refusing to consider or to permit the jury to consider the illegality of the administrative action cannot succeed. A similar attempt was made by the court of appeals below in *Smith* v. *United States*, 148 F. 2d 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case in this Court. This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. This Court did not consider the error harmless, as did the Fourth Circuit Court of Appeals in its affirmance of the judgment. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the court limited determination of the issues to whether the defendant complied with the order. In these cases the court trying the indictments limited the determination to whether the petitioners complied with the orders to submit to induction. Moreover, in the *Smith* case, as well as in these cases, the convicting court did not pass upon the legality of the administrative determination.

If the courts below, under the writs of habeas corpus, can pass upon the validity of the administrative determinations after reviewing the draft board files, then the convicting courts should have done so. Inasmuch as the convicting courts failed to consider the legality of the administrative determinations, and failed to permit the jury, in each case, to determine the legality of the administrative action, the errors, which are denials of due process, cannot be cured

by the rationalizing of the courts below in these cases. In the same way, the error in the *Smith* case could not be cured by the rationalizing of the Fourth Circuit Court of Appeals. *Smith* v. *United States*, 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by this Court is best expressed by the last sentence of its opinion in the *Estep* and *Smith* cases, 327 U. S. 114.

In *Gibson* v. *United States* and *Dodez* v. *United States*, 67 S. Ct. 301, a similar conclusion was reached: "This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists, however, that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced, would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause. Accordingly he asks for a judgment here directing that such relief be given. [¶] In the *Estep* and *Smith* cases, after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: 'We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.' 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith. Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues. . . . [¶] Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the merits, by examining and sustaining his defense. The same

course should be followed for Gibson in this respect as was directed for Dodez." 67 S. Ct. 301, 307, 312.*

If this Court was of the opinion that the performance of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of his ministerial work or that there was basis in fact for the determination of the draft boards, would be grounds for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action, it would have so held in the *Smith* case.

It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because the courts below in the *Sunal* case were of the opinion that the draft board did not err in making its classification. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error by a habeas corpus court on the ground that the undisputed evidence shows that the defendant is guilty. The effort of the courts below in the *Sunal* case to hold as harmless error the denial of due process by the convicting court is an effort to convert habeas corpus inquiry into a trial *de novo* of the guilt or innocence of the prisoner. This cannot be permitted.

A conclusion similar to that argued by the prisoners here was reached by United States District Judge J. Joseph Smith in the District of Connecticut in two cases.

In *United States* ex rel. *Arpaia* v. *Alexander*, decided September 27, 1946, 68 F. Supp. 820, in discharging the

* See slip opinion of this Court in the *Gibson* and *Dodez* cases, 11-12-22.

prisoner upon facts identical to the facts in the cases at bar, he said: "On these facts the Court cannot say that a claim that the Board had acted arbitrarily and without evidence in reaching its classification was a sham or frivolous defense which could not be considered by the trier in the criminal case. The petitioner should, therefore, be discharged from custody. The refusal of the Court to consider his evidence deprived him of a substantial defense which he was entitled to have the Court weigh."

In *United States* ex rel. *Flakowicz* v. *Alexander, Warden*, decided on December 4, 1946, in discharging the prisoner from custody upon facts identical to the facts in these cases, Judge Smith declared: "Denial of the opportunity to have the defense considered invalidates the court proceedings and it is unnecessary for this court, on habeas corpus, to proceed further and determine whether the action of the Selective Service board was in fact arbitrary or not founded on evidence. . . . Since the *Estep* case makes it plain that the defense should have been allowed in the criminal case, we do not here reach the question of review by the habeas corpus court, of the action of the board, since the custody attacked is ended by the invalidation of the criminal judgment. The granting of habeas corpus here by reason of the defect in the criminal trial, brought about by the *Estep* and *Smith* decisions, gives the Government the choice whether to re-try the petitioner on the present indictment, with the defense of arbitrary action of the board available to Flakowicz, or to present to the Selective Service board anew the question of the classification of the petitioner under whatever evidence may presently be available."

With respect to the second point that the conclusion contended for by the Government is dictated implicitly by the dictum in the *Estep* case, little need be said. The members of this Court know more about what the Court intended to hold in the *Estep* case than anybody else. But, taking the

language of the Estep opinion on its face and accepting the dictum referred to there for what it says, the conclusion cannot be reached that this Court intended to limit, in habeas corpus proceedings, the inquiry to a determination of the validity of the draft board proceedings.

It is true that the Court in the *Estep* opinion stated that if it should hold that the orders of draft boards could not be challenged in defense to indictments then the remedy of habeas corpus would be available after conviction and imprisonment to assail the order of the draft boards and to challenge their jurisdiction. It should be observed that the Court stated, however, that the remedy would be available *only in event the Court held* that a registrant could not defend on his criminal trial on the ground that the draft board order was illegal. The Court did not hold that the registrant could not defend. This Court held that the registrant could so defend upon the criminal trial. The Court having held in the *Estep* opinion that the defense was available upon the trial of the indictment, it is not reasonable to place upon the dictum of such opinion a construction which would limit the inquiry in these habeas corpus proceedings only as to the validity of the draft board proceedings.

There is certainly nothing in the *Estep* decision that would indicate that habeas corpus review of criminal proceedings under Section 11 of the Act should be limited and restricted any more than the scope of review allowed upon the hearing of a writ to review any other criminal proceedings. If a convicting court violated the law under the Act by denying one the right to challenge the validity of the draft board order, the inquiry should be as broad in such proceedings as in any other habeas corpus case where there is asserted a denial of due process of law by the convicting court.

It is only in event the Court decides that there was no violation of a constitutional right by the convicting courts

of such magnitude as to make the judgments of conviction void that this Court is required to go into the validity of the draft board proceedings.

Prisoners here filed "double-barreled" petitions for writs of habeas corpus. They aimed their attacks at both props relied upon by the Government to support the judgments of conviction. One prop that the Government relies upon is that the proceedings in the district court did not make the judgments void. If the prisoners are successful in knocking the first prop down, the judgments of conviction must fall. Anyway, in such event, it is unnecessary to knock down the second prop.

In case the prisoners are not successful in getting this Court to knock down the first prop because of the illegality of the court proceedings, then it becomes the duty of the Court to decide whether or not the second prop should be knocked down because of the illegality of the draft board proceedings.

An inquiry into the illegality of the draft board proceedings in these cases certainly ought not to be for the purpose of deciding whether or not the convicting courts committed error in excluding from consideration of the courts and juries the validity of the draft board proceedings. In these habeas corpus proceedings the unconstitutionality of the action of the convicting courts in excluding these issues from the cases do not depend upon a subsidiary inquiry as to whether the draft board proceedings are void.

However, the assault which the prisoners make against the judgments of conviction in an effort to knock down the second prop supporting the judgments is based entirely upon whether the district courts' judgments must fall because of the invalidity of the draft board orders. If it can be made to appear that the draft board orders supporting the indictments are void, then it must be concluded that the indictments likewise must fall.

If the indictments must fall so also must the judgments of conviction. This position is not at all anomalous, nor is it strange or novel. Indeed in habeas corpus proceedings the courts many times have gone behind the judgment of court martial proceedings to ascertain whether the armed forces had jurisdiction over the prisoner. The habeas corpus proceedings in these cases, assuming for the purpose of argument that the proceedings of the convicting courts did not deprive the prisoners of a constitutional right, ask the Court to inquire as to whether the district courts had jurisdiction to entertain the prosecutions because the administrative agency and the Department of Justice had no jurisdiction to institute the delinquency proceedings in the convicting courts to begin with.

The mere fact that the Second Circuit Court of Appeals failed to pass upon the validity of the draft board proceedings in the *Kulick* case, which the district court considered, in no way precludes this Court from reviewing the draft board proceedings, if this Court concludes that it is the proper issue in these cases.

This Court can pass on the validity of the draft board proceedings in the *Kulick* case even though the court of appeals did not do so. It is not necessary to vacate the judgment and send the case back for reconsideration by the court of appeals as was done in the case of *United States* v. *Sheridan*, 67 S. Ct. 332. In appeal of habeas corpus proceedings, the procedure of this Court is altogether different from the procedure of the Court in other cases. In other cases where the court of appeals fails to pass on a question it is proper to vacate the judgment and send the case back to the lower court for reconsideration. But in habeas corpus proceedings this Court is authorized to dispose of the prisoner as law and justice require. The Court is therefore enabled to render the type of judgment that the courts below should have rendered upon the entire record made without remanding the case for reconsideration

by the court below. This is uniformly the rule in all habeas corpus proceedings coming from lower federal courts.

The failure of the Second Circuit Court of Appeals to pass upon the validity of the draft board proceedings was not reversible error because the judgment of that court can be affirmed on the ground that the denial of Kulick's right to make his defense to the indictment in the district court constituted a deprivation of a constitutional right which made the judgment void. It is a fundamental proposition that even though the reasons discussed by a court below for the judgment which it renders are invalid, nevertheless if the judgment can be supported on any other ground it should be approved by this Court.

It has never been questioned that a federal court can by habeas corpus inquire into the legality of the restraint of one imprisoned by a court-martial order. If the court finds that the armed forces do not have jurisdiction because of the failure of the prisoner to be properly enlisted, or refusal to submit to induction, or illegality of the administrative action that forces the prisoner into the armed forces, the petitioner will be discharged from custody.—*Ex parte Reed*, 100 U. S. 13; *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109; *Billings* v. *Truesdell*, 321 U. S. 542; *United States ex rel. Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *United States ex rel. Beye* v. *Downer*, (CCA-2) 143 F. 2d 125.

In *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, it was held that the prisoner was entitled to discharge under the writ of habeas corpus, although restrained by a court-martial decree, where it appeared that the draft board did not comply with the Regulations in classifying him as liable for induction. In the *Ver Mehren* case, "The Court thus went behind the court-martial back to the Board, and having found that the Board had improperly inducted him, wiped out the court-martial conviction entirely. In other

words, after the petitioner had actually been convicted by court-martial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance." *Ex parte Stewart*, 47 F. Supp. 410.

In the habeas corpus proceedings instituted by prisoners it is the duty of the Court to inquire into the want of authority of the draft boards to set in motion the delinquency proceedings under the Act. If they had no jurisdiction, then the convicting court had no jurisdiction. Their action in excess of their authority in ordering a minister of religion to do training and service vitiated the subsequent proceedings resulting in the imprisonment of prisoners. The wardens acquired custody over prisoners by virtue of the Act and Regulations. So also, under the Act, a prison-keeper for the armed forces acquires jurisdiction over an inductee who defies the orders of the military authority. It is the administrative agency created by the Act and functioning under the Regulations which sets in motion the chain of events that results in the imprisonment of the minister of religion whose claim for exemption has been ignored. In either case the want of authority on the agency defeats the claims of the prison-keeper to custody of the prisoner.

It is said by Judge Yankwich in *Ex parte Stewart*, 47 F. Supp. 410, that there is a "need for a competent authority to question the possible arbitrariness of a board" and that the need "is clearer, because of the fact that no questioning of the action of the Board is allowed in a prosecution resulting from disobedience of any of the orders issued by the Board. Were it otherwise, we should have an instance,—which our law abhors,—of finality of administrative action which might leave a person at the mercy or caprice of a lay board, without the power to review arbitrariness, abuses of authority or even lack of jurisdiction. Such a situation is inconsistent with the doctrine of limited

sovereignty which is at the basis of our constitutional structure, and which postulates the existence in the individual of certain rights which he can assert against the sovereign power itself. And, perhaps the most fundamental of these rights is the right of freedom of person, of which the individual cannot be deprived, even in wartime, except through machinery which guarantees the fundamentals of due process. (See Yankwich, *The Constitution and the Future*, Ch. III). . . .

"Suppose he stands convicted; would he be in a better position to raise the question whether he was legally inducted by suing out a writ against the warden of the penetentiary? Most certainly not. Then, why should he wait? The only real question here is: Is the petitioner being deprived of his liberty by virtue of the action of the board? The answer is: Yes, because he has been arrested for failure to obey the order of the board. And he does not have to wait until he has been convicted to challenge that order. *One may raise the question of due process after conviction.* But a person need not wait until then." (YANKWICH, J.; in *Ex parte Stewart*, 47 F. Supp. 410) [Emphasis added]

"In other words, my view is that, if an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a Selective Service Board, no matter at what state he is restrained, he may, by writ of habeas corpus, question whether there was evidence to sustain the action of the board. He does not have to wait until he is inducted, and direct the writ to the Commanding Officer. Nor does he have to risk conviction, desertion or court-martial." (*Ex parte Stewart*, 47 F. Supp. 410, at p. 414.) See also the opinion of the district court in *Goodwin v. Rowe*, 49 F. Supp. 703.

The Government has many times argued that if a registrant had submitted to induction at the camp he could have obtained judicial review of his claim for exemption and the illegal action of the administrative agency in rejecting it.

Even if he defied the military authority after induction into the armed services and was sentenced to prison by court-martial he still could challenge the authority of the administrative agency and show the illegality of the order to submit to induction. *A fortiori,* if defiance of the military authority after induction does not preclude judicial review by writ of habeas corpus, then defiance of the administrative agency by refusing to submit to induction does not preclude similar judicial review by writ of habeas corpus in behalf of one imprisoned under the criminal sanctions clause of the Act for such refusal to submit to induction. The indictment and judicial proceedings thereunder have no stronger armor to resist the writ of habeas corpus than do the court-martial proceedings. The writ penetrates both to reach the vulnerable arbitrary order of the administrative agency that precipitated the attack against the prisoner.

## FOUR.

**The holdings of the trial court in the Kulick case and both of the courts below in the Sunal case that the orders of the draft boards were lawful are erroneous. The orders are illegal as a matter of law.**

### A

**The denials of the claims for exemption as ministers of religion made by the prisoners and their classifications by the draft boards were arbitrary, capricious and in excess of the jurisdiction of the draft boards, because they were without basis in fact.**

It becomes necessary to consider the validity of the draft board determinations in these cases only in event the Court adopts the conclusion that the scope of inquiry in these cases should be limited exclusively to the determination of whether the draft board illegally denied prisoners any of their rights under the Act and Regulations or in

the event the Court, after reviewing the proceedings in the convicting courts, reaches the conclusion that there was no denial of a constitutional right which is of such magnitude as to make the judgments of conviction void. In event this Court reaches the conclusion that the scope of inquiry in these cases properly extends to review the draft board proceedings if the convicting courts' proceedings are found to be valid, it will become necessary to pass on the questions raised under this point of the argument. Moreover, if the Court reaches the opinion that it may inquire into the validity of the draft board proceedings in order to ascertain whether or not harmless error was committed by the convicting courts, then of necessity it must consider the discussion under this point. Of course, if this Court reaches the conclusion that the scope of inquiry in these habeas corpus proceedings ought to be limited exclusively to a determination of whether the convicting courts unlawfully denied prisoners the right to be heard as to their defense, then it will become unnecessary to consider the validity of the draft board determinations or the argument made under this point.

The undisputed evidence in these cases shows that the prisoners prior to their classifications and trials were full-time pioneer missionary evangelists. Their primary occupation was that of ministers of the gospel. Each devoted the full amount of time required for such missionary evangelists. Their lives are as much devoted fully to the performance of their ministry as are the lives of judges, congressmen, governors, members of the state legislatures and the orthodox recognized clergy fully devoted to the performance of their respective duties, all of whom have been excused from the performance of training and service under the Act.

In the case of Kulick the Government relies upon a number of diversified factors for its contention that the prisoner was legally classified by his board. Some of such

factors will be stated and analyzed to show that they have no material bearing upon the status of Kulick under the Act. The grounds mentioned by the Government do not justify the denial of the claim for exemption as a minister that was made by Kulick.

It is mentioned that Kulick was studying for the ministry when he was from 11 to 16 years of age and began to preach as a part-time minister at the age of 16 in 1939. It is said that such facts justified the denial of the exemption claim in 1944. His former status had nothing to do with the action of the board in 1944. Moreover, this fact was before the board in 1943 when the board granted him his exemption. Being before the board in 1943 it could not be considered as a new circumstance justifying the change of classification in 1944. The youthfulness of any of Jehovah's witnesses, as prisoners were when they began their ministry, does not affect their qualifications when they filed their questionnaires. If they are old enough to be taken into the armed forces and assume such responsibilities, they should be old enough to be ministers. The history of their preaching at an early age is not unusual to true followers of Christ. Their Christian parents brought them up "in the nurture and admonition of the Lord" and put them into the "temple service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at Deuteronomy 6:4-7. See Ephesians 6:1-4: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19.

Timothy was ordained to preach as a disciple when but a small boy. (Acts 16:1-3) Paul, the apostle, wrote this "son of faith" thus: "Let no man despise thy youth; but

be thou an example of the believers, in word, in conversation [conduct], in charity [love], in spirit, in faith, in purity." —1 Timothy 4:12; 2 Timothy 3:15; 1 Corinthians 4:17, *American Standard Version.*

Samuel, the prophet, was consecrated for service in the temple when very small and of tender age.—1 Samuel 1:24; 2:11, 28.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God." (Luke 18:16; see also Matthew 18:1-6) Psalm 8:2: "Out of the mouth of babes and sucklings hast thou ordained strength"; Psalm 148:12, 13: "Both young men, and maidens; old men, and children: let them praise the name of the Lord: for his name alone is excellent; his glory is above the earth and heaven." —Proverbs 8:32.

Regardless of the age at which the prisoners began their ministry, there is nothing to show that they were disqualified to act as ministers of Almighty God at the time of their classification and, as such, were entitled to complete exemption.

It is argued further by the Government that Kulick had full-time secular employment as an industrial worker which he kept up until shortly after he registered in 1942. It was not what his status was prior to or at the time of his registration that determined his rights under the Act and Regulations. It was what his occupation and status was on the date of the final classification that determines the legality of the action of the board. This would also apply to the objection made that Kulick did not become a pioneer or full-time minister until one day after he registered with his local board. The fact is that he was a full-time pioneer minister devoting 150 hours per month to his ministry at all times since his classification in class 4-D as a minister.

It was his status at and since his exemption as a minister and on the date of the unjustified change from an exempt status to that of a non-exempt status that really counts.

In the case *United States ex rel. Hull* v. *Stalter* (CCA-7) 151 F. 2d 633, the same facts were urged by the Government. There it was contended that Hull had full-time secular work until after he filed his questionnaire, following his registration. Moreover, it was urged that he did not go into the full-time ministry until after he saw he was about to be drafted. Also it was contended, as is usual for the Government to contend in every one of the cases involving Jehovah's witnesses, that Hull did not have his name on a list. The court found that it was the status of the registrant at the time of the final classification rather than at the time of registration that determined the validity of the order. In that case the court said:

"We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. . . . The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than at the time of registration."

It is urged that the failure of Kulick to inform the board that he was devoting about two hours per week to

modeling was justification for the change in his classification. This is a very specious and factitious argument. If the mere devoting of two hours per week or even seven hours per week to modeling would justify the taking of his exempt classification away from him then all of the exempt persons and deferred persons under the Act would be in a very insecure position. It is not the incidental work that Kulick did on the side to earn a living that determined his right to the exemption. It was whether he had regularly and faithfully discharged his duties as a full-time pioneer missionary evangelist that settled the matter. The undisputed evidence and the record show that he was at all times faithfully preaching 150 hours or more per month. It is a distortion of the record to say that two hours per week devoted to secular work to earn a living prevented him from doing his ministry. Even seven hours per week devoted to such modeling work would not and did not affect his ministry status. The performance of his secular work was wholly immaterial to his ministerial status and therefore it was not necessary for him to notify the board of such work. He was required to notify the board of only such facts as would affect his exempt status, such as if he had quit the ministry or changed his profession and occupation. His vocation was that of a full-time missionary evangelist. It has never changed since the date of his being declared exempt by the local board in 1943. His avocation was part-time modeling in his spare time from his ministry duties. The unreasonable contention made by the Government concerning the time spent in his avocation places an arbitrary construction upon section 5 (d) of the Act so as to result in injustices. Suppose every person who was entitled to exemption or deferment under the Act should be denied their rights because of pursuing an interesting hobby in his spare time. Such would make a mockery out of the law and lead to unreasonable results. There is no evidence that Kulick pursued the ministry as an avo-

cation. It was his life-time work and occupation and he was entitled to pursue it without telling or being required to tell the draft board of what he did in his spare time.

Much emphasis is placed upon the fact that Kulick was justifiably changed from 4-D to 1-A because of the fact that upon the hearing, (following the complaint by telephone from a clerk of another board) it is asserted that upon the hearing he was evasive about his modeling and for that reason he was justifiably changed. It is claimed that his testimony about what he did with his time was not satisfactory. To begin with, the inquiry by the board showed that they denied his claim for exemption because he had an avocation or did something other than preaching in his spare time. This was a wholly arbitrary and unreasonable basis for taking his exempt classification away from him. The board was not interested in whether he devoted his full time to his ministry. Indeed the board did not find and could not find upon the undisputed evidence before them that Kulick did not faithfully and fully discharge his duties as a full-time pioneer. There is no evidence, and there was no contention, that he was not a full-time pioneer minister. The very most that can be made of the evidence, viewing it most favorably to the Government, is that at times he earned as much as $35.00 per week from his modeling work. Assume that he earned this much every week it still would not prove that the modeling work was a vocation. It could not be shown that the time devoted to earning that much money a week materially prevented him from performing his ministry duties. He did not admit that he earned that much. His undisputed testimony is that he devoted only about two hours per week to modeling. But even if he earned $35.00 per week in the modeling work it still would be an avocation to him because he earned $7.50 per hour in that work. At $35.00 per week he would be required to devote only about four or five hours per week. It is unreasonable to say that if

a minister should devote as much as four or five hours per week to an avocation he would be denied the exemption that his vocation entitled him to.

The real reason that Kulick was changed from his exempt classification as a minister was because of the false telephone report that when he was not modeling in an army uniform he was sitting around his home. This hearsay report was false as to his sitting around his home when not modeling. It was relied upon by the board. Moreover, the board illegally found that he was inconsistent in claiming exemption from training and service and in wearing an army uniform while carrying out his avocation. This finding was arbitrary and capricious. There is nothing inconsistent in a minister's wearing an army uniform or any other kind of a uniform in the pursuit of an avocation as a model. It was unreasonable for the board to decide his case on any such basis. The prejudice of the board on this issue entirely blinded them from the real consideration as to whether he was in truth and in fact devoting his full time to the pursuit of his ministry. There was no evidence whatever to dispute the proof showing that he was. The finding of the board was without basis in fact and arbitrary and capricious.

The fact that Kulick and Sunal incidentally performed secular work in no way interfered with or prevented them from performing their duties as ministers of religion. The source of financial revenue of persons excused by the Act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.

The fact that a judge of a court may reside on a farm or ranch and/or operate it during his term of office in no way affects the statutory deferment as long as he fills the office of a judge. The fact that a governor of a state may own and operate some commercial business in no way weakens his claim for deferment under the Act. That a

congressman may maintain a law office and carry on a lucrative practice while serving in the Congress in no way estops him from claiming the deferment granted by the Act. That a wealthy clergyman may devote all of his spare time to the caring of investments in bonds, stocks, real estate and other enterprises in no way deprives him of his right to claim exemption under the Act as long as he is recognized by his organization as a minister of religion and teaches and preaches regularly the doctrines and principles of a recognized religious organization.

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the Act cannot be supported solely by a finding that such person had other activities on the side that would not, within themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the Act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

Denial of exemption or deferment upon these irrelevant and immaterial considerations would be undoubtedly contrary to law, arbitrary and capricious and without basis in fact, thus establishing that the order denying the claim is in excess of the jurisdiction of the draft board. The error and trap into which the Government and the courts below, as well as many other courts, have fallen in these cases, is the result of pursuing these very irrelevant and immaterial considerations.

Kulick's previous secular employment, his youthfulness when he undertook study of the ministry and when he became a minister, and the nature of his preaching activity had all been before the board when it granted him exemption. It cannot be argued that these considerations were justification of the change in his classification.

The holdings of the draft boards in these cases are in direct conflict with the holding of the Seventh Circuit Court of Appeals in *United States* ex rel. *Hull* v. *Stalter,* 151 F. 2d 633.

Moreover, the draft boards' holdings are out of harmony with the dictum expressed on the same question by other circuit courts in *Lehr* v. *United States* (CCA-5) 139 F. 2d 919, 921-922, and *United States* ex rel. *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, 949.

Also, the draft boards' holdings, in effect, that activity of prisoners here was nothing more than that of lay workers of a religious organization and was not preaching as a minister, is directly in conflict with decisions in *Murdock* v. *Pennsylvania* (1943) 319 U. S. 105, 106-109, 110, 111, 117, and *Follett* v. *McCormick*, 321 U. S. 573, where facts in reference to the ministerial activity were identical with facts here. In those decisions it was held that the activity of Jehovah's witnesses occupied the same high estate as do orthodox preaching from the pulpit. Furthermore, it was held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

Additionally, the draft board's decision interpreting the Act and Regulations is in direct conflict with the administrative interpretation placed upon the Act and Regulations by the National Headquarters of Selective Service System in State Director Advice 213-B, and Opinion No. 14. (Sunal's Exhibit C; Kulick's Exhibit 2) The National Headquarters says that "the *regular* discharge of his duties as a minister is a most important factor in determining whether a regis-

trant should be classified" as a minister of religion. (Emphasis added) (Sunal's Exhibit C, Advice No. 213-B)

The draft boards' construction of the Act and Regulations contradicts that statement of advice by National Headquarters.

Again the National Headquarters says that the "historic nature of the ministerial function of a registrant's *own religious organization must be taken into consideration in each individual case.*" (Emphasis added) (Sunal's Exhibit C, Advice No. 213-B)

That statement of advice by National Headquarters also is contradicted by the draft board in construing the Act and Regulations.

Still more, National Headquarters holds that performance of secular work does not deprive a minister of his right to exemption, by saying, "In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work." (Sunal's Exhibit C, State Director Advice No. 213-B)

The draft board's construction of the Act and Regulations contradicts also that statement of advice by National Headquarters.

And, finally, National Headquarters of the Selective Service System specifically advises all draft boards that whether one of Jehovah's witnesses is to be classified as exempt "must be determined *in each individual case* based upon whether he *devotes his life* in the furtherance of the beliefs of Jehovah's witnesses, whether he *performs functions which are normally performed* by regular or duly ordained ministers of other religions, and finally, *whether he is regarded by other* [of] *Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.*" (Emphasis added) (Sunal's Exhibit C; Kulick's Exhibit 2 and TR 164-169) [60] *

* The Court can judicially notice the administrative opinions and interpretations of the Act and Regulations. Bowles v. United States, 319 U. S. 33, 35.

That statement of advice by National Headquarters likewise is contradicted by the draft boards in construing the Act and Regulations in these cases.

Much emphasis is placed by the draft boards upon the absence of prisoners' names from the certified official list of Jehovah's witnesses forwarded to State Headquarters by National Headquarters of Selective Service System. To begin with, the requirement made by the Selective Service System that the Society file a list of its full-time pioneer ministers with National Headquarters was arbitrary. No other religious organization was required to file a list of its full-time ministers.

The presence or absence of the name of these ministers of Jehovah's witnesses did not justify the local boards or appeal boards in denying prisoners' claims for exemption as ministers of religion under the Act. It was the duty of the draft boards to classify each according to the facts appearing in the files irrespective of the absence of his name from the list of ministers filed with the Selective Service System.

Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the persons whose names were to be added.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of National Headquarters having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification

by addition of a registrant's name to the list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the Director of Selective Service changed the policy regarding the adding of names to the list, and discontinued the practice of placing new names thereon.

This Court can take judicial notice of the records of the Selective Service System showing the policy of that agency with respect to Jehovah's witnesses and the arrangements that the Watchtower Society was forced to comply with. The records of the system showed that such Society recognized and certified all of its ministers, including prisoners, whose names were not on that list, to be authentic, duly authorized representatives of it, and it recognized all of its ministers, including these prisoners, as ministers regardless of whether their names appeared on the list which was under the control of the Selective Service System.

When the local boards finally classified the prisoners, the policy had been changed and it was impossible to have their names added to the list. When prisoners were finally classified, the undisputed evidence showed that they were in full-time status as pioneer missionary evangelists with the Society. It was the duty of the boards to classify them according to their status at the time of their classification. The action of the draft boards and the argument of the Government is directly contrary to the decision of the Seventh Circuit Court of Appeals in *United States* ex rel. *Hull* v. *Stalter*, 151 F. 2d 633. In that case the court held that the absence of Hull's name from the list did not justify the arbitrary denial of the claim for exemption as a minister. The court pointed out that the list had been abandoned at the time he was classified and that the failure to have his name on the list was immaterial.

On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified official list. The opinion provided: "The status

of members of the Bethel Family and pioneers whose names do not appear upon such certified list shall be determined under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded." (TR 167-169)

The failure of one of Jehovah's witnesses to have his name to appear upon the official list circulated by the Director of Selective Service to all State Headquarters does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official

list of pio. er ministers referred to in Opinion No. 14 or State Director Advice No. 213-B, does not authorize the boards to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards." (See Government brief, p. 15, n. 9 and pp. 17-18)

In a letter from General Hershey, Directo of Selective Service, dated July 7, 1943, concerning the certified official list, he said, among other things, "The official list of Jehovah's witnesses, is no more than information from National Headquarters as to those members, who within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name on the list may be considered by the draft boards in classifying a registrant, the absence of or even removal of a person's name from the list is not made the conclusive and exclusive test. The list was established and is maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the System and the Society to exclude from consideration by boards the exemption claim of other persons whose names did not appear thereon.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon

the certified official list circuited by National Headquarters to the various State Headquarters of the System. Indeed, Opinion No. 14 (now superseded by State Director Advice No. 213-B) extends to full-time ministers of Jehovah's witnesses like the prisoners here whose names do not appear on or have been removed from the official list.

A broad and liberal interpretation should be placed upon the Act by the Court. It should be held that Congress intended to extend the provisions of the exemption not only to the orthodox denominations but to the dissentient and unpopular groups as well. Certainly Congress did not intend to restrict the protecting shield of the exemption to any particular denomination or creed. Congress intended that ministers of all religious denominations and groups should share the benefit of the exemption, in the same way as did the authors of the Constitution intend to bring within the protecting shield of the First Amendment the ministers of unpopular and dissentient groups as well as those of the popular and more orthodox denominations. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141.

Uniformly the Supreme Court has held that a broad and liberal interpretation should be placed upon the provisions of the various statutes exempting from taxation the property of religious organizations. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosdrio de Filipinas*, 263 U. S. 578; *Helvering* v. *Bliss*, 293 U. S. 144.*

Preaching activities of ministers of religion bear burdens that would ordinarily fall directly upon the govern-

* Trustees of Griswold College v. State, 46 Iowa 275; Watterson v. Halliday, 77 Ohio St. 150, 82 N. E. 962; Mattern v. Canevin, 213 Pa. 588, 63 A. 131; Congregational Society of Town of Poultney v. Ashley, 10 Vt. 241, 244. Cf. Sharraai Berocho v. New York, 60 N. Y. Super. Ct. 479, 18 N. Y. S. 792.

ment. Were it not for the eleemosynary work the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper laws. The contribution to the government through the benefits received by the people from the preaching activity of ministers of religion cannot be equaled by the government were it to undertake such work. The charitable activities of ministers of the gospel "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure." *Trustees of First M. E. Church South* v. *Atlanta*, 76 Ga. 181, 192; *M. E. Church South* v. *Hinton*, 92 Tenn. 188, 190, 21 S. W. 321, 322; *People* v. *Barber*, 42 Hun (N.Y.) 27; *Comm'th* v. *Y.M.C.A.*, 116 Ky. 711, 76 S. W. 522.

These same arguments as grounds for exemption of the minister of religion from all training and service in the armed forces were duly considered by the House Committee on Military Affairs at hearings had upon the Burke-Wadsworth bill, H. R. 10132. (Hearing before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Session, July 30, 1940, pp. 299-305, 628-630) When the bill was before Congress, for consideration before passage, members of Congress declared that the exemption was for the purpose of maintaining the institutions of religions during the war and to insure the performance of and to guarantee that the people would receive religious training and guidance during the war.

There is nothing in the terms of the Act indicating that the Congress intended to restrict the terms "regular minister of religion" or "ordained minister of religion". Indeed

the records of the deliberations of the Congress indicate that it was the intention of the lawmakers to give the same broad definition to such terms as have been given by the whole people of the nation since the days of the first settlers of the country. That construction is a broad and liberal one so as to avoid discrimination.

The "Senate Committee on military affairs worked out an amendment to the Burke-Wadsworth bill deferring the military training of certain groups, ministers and others. The amendment was not satisfactory to all the churches. On August 12 I submitted amendments which do have their approval. . . . In presenting this amendment to the Senate I assume that those persons charged with the administration of this Act will give to religion its proper place in a democratic form of government, and to this end will adopt such rules and regulations as will embody the accepted definitions of the terms 'regular or duly ordained ministers of religion' as those terms are meant within this amendment. . . . A regular minister of religion, as used in my amendment, should mean a person who as his customary vocation preaches and teaches the principles of a religion, of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (Senator Johnson of Colorado, 86 Cong. Rec. 10293, 10294. Cf 86 Cong. Rec. 10095)

The greatest part of the discussions in the deliberations of the Congress during consideration of the Burke-Wadsworth Bill insofar as they pertained to ministers and students preparing for the ministry were devoted almost exclusively to students preparing for the ministry. There is no question that it was definitely intended that students preparing for the ministry were considered by some of the Senators who discussed the matter as exempt only when they were engaged full time in the study. In

other words it was intended that the student preparing for the ministry should be a full-time student. There was nothing in the Act to indicate that if he worked at odd jobs to maintain himself in his schooling he would be denied his claim for exemption. The only requirement was that he be a full-time student and no more was demanded. Senator Walsh said, in his discussions of the provision for the exemption of ministers, that "ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted." (86 Cong. Rec. 10502) Mr. Connally asked: "The bill exempts all ministers actively engaged in their duties. Is that correct? Mr. Walsh: Yes." (86 Cong. Rec. 10505)

It seems to be the emphatic opinion of at least one Senator that it was not necessary that a minister of the gospel should have attended a divinity school as a condition precedent to becoming a minister of the gospel. Mr. Connally said: "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption [students preparing for the ministry]. Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or fallow candle." (86 Cong. Rec. 10589-10590)

It was said that the provisions for exemption of ministers in the Burke-Wadsworth Bill was the same as the provision which appeared in the 1917 Act. (86 Cong. Rec. 10293) The provisions of the 1917 Act while being considered by the members of the Congress were held to extend to regular ministers as well as the ordained clergy.

It was provided that regular ministers, those not ordained as the clergy, should receive the same treatment as the ordained clergy received. (55 Cong. Rec. 1527, 1528) It was said that a regular minister "would mean a man whose calling is the preaching of the gospel and who follows that calling for a life work." (55 Cong. Rec. 1528)

The history of the discussions in the Congress shows no intention to limit the interpretation of the term in the manner as the Government would have it limited. Indeed Senator McKellar considered that a lay preacher was exempted under the 1919 Act. He said: "I think it will be conceded by all the record of Sgt. Alvin York overtopped and overreached the record of any other plain soldier who went into the American Army. Sergeant York was a lay minister. At the time the draft was put into operation he was urged by his friends, he was urged by his own conscience, by his own belief in peace, and by his own horror of war to ask for an exemption from the army because he was a minister of a church. After careful consideration, he concluded not to ask for exemption, . . ."

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and service." *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-42, p. 239.

In speaking of this exemption in *United States ex rel. Trainin* v. *Cain* (CCA-2, 1944) 144 F. 2d 944, it was said that ministers were exempted in order to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."

In order to give the Act and Regulations the broad interpretation contended for here, it is not necessary for the court to strain the language of the Act and Regulations. Indeed, all that has to be done is to put a reasonable interpretation upon the language of the Act and Regulations in the light of history.

The Act provides: "Regular or duly ordained ministers of religion and students who are preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this Act." (Selective Training and Service Act, 54 Stat. 887, 50 U. S. C. App. § 305 (d))

The Regulations define a *regular minister of religion* to be "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." (Reg. 622.44 (b))

"A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." (Reg. 622.44 (c))

These definitions do not say that the minister must be a member of an orthodox denomination. They do not exclude any member of any dissentient organization.

It is quite apparent that the Congress, in enacting the Selective Training and Service Act of 1940, did not intend to discriminate. It intended that the provisions of the exemption provision for ministers of religion should extend to all ministers of all denominations. There can be no question that the Congress intended to put upon the terms "regular minister of religion" and "ordained minister of religion" the same broad and commonly accepted definition that has been placed upon the terms in common parlance and in history of the ministry of the gospel in this country. Congress did not intend to limit the beneficent provisions of the exemption in the Act to any particular class of clergy or ministers. They intended to be fair to all. Since the Congress did not limit or restrict the definitions of the terms it is proper to consider what the terms

have meant to the people in light of history and of other situations similar to that presented in these two cases.

The term "regular minister" is used in the Regulations. The term "regular minister" has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. *Ex parte Cain*, 39 Ala. 440-441.

It is to be observed that the Regulations use the word "customarily". *Customary*, the word from which it is derived; is synonymous to "usual" and "habitual". It does not mean *continuously*. It is not synonymous to *continuously, uninterruptedly, daily, hourly,* or *momentarily*. The Century Dictionary defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores, and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching.

If he regularly and customarily preaches during the week, he is a regular minister of religion under the Act and Regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain himself is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily teaches and preaches.

When the pioneers came to this country and settled it the ministers came along with them, working during the week and preaching regularly on Sunday. When the early settlers pushed into the midwest and the west and pioneered through to the Pacific coast ministers of religion went along, accompanying them, working in the woods and fields and following various secular occupations on six days of each week and regularly and customarily preaching on Sundays. Indeed, even today, in the small towns throughout the nation and in the rural areas are to be found thousands upon thousands of ministers of various religious denominations who work at secular work during the week to support themselves and who on Sunday regularly and customarily preach as do clergymen of the more wealthy congregations in the cities. True, there are scores of thousands of more ministers in the towns and cities, especially the large cities, who have been called by congregations sufficiently large and wealthy to provide them with an income that relieves them of the need to labor during the week. Surely Congress did not mean to say, when it wrote the exemption into the Act, that it was only for clergymen of wealthy congregations able to support their respective ministers so that they

would not be required to work at any secular avocation.

It should be remembered that Christ Jesus' apostle Paul, the foremost spokesman of the early Christian church, worked regularly at making tents. He chose to support himself by secular work rather than to be a charge and burden upon the poor people to whom he ministered publicly and from house to house.*

To construe the Act and Regulations so as to *exclude* ministers who are forced, or who, as Paul deliberately choose, to resort to secular work to sustain themselves in the ministry and thus to enable themselves to minister gratuitously to the poor and needy and themselves "be dependent on nobody", is to impute to Congress the intention of limiting the benefit of the exemption to the big-town and city ministers. So to construe the Act results in the inequality which Congress ever seeks to avoid. So to construe brings only the un-American result of excluding from 'equal protection of the law' those ministers of small towns and rural communities of the country who are either unable or unwilling to enjoy wealth that enables big-town

* "Paul departed . . . to Corinth; and found a certain Jew named Aquila, . . . with his wife Priscilla . . . and came unto them. And because he was of the same craft, he abode with them, and wrought: for by their occupation they were tentmakers. And he reasoned in the synagogue every sabbath, and persuaded the Jews and the Greeks." (Acts 18:1-4) "Paul . . . sent to Ephesus, and called the elders of the church. And when they were come to him, he said unto them, Ye know . . . how I kept back nothing that was profitable unto you, but have . . . taught you publickly, and from house to house." (Acts 20:16-20) "But we exhort you, brethren, . . . to work with your hands . . . and *be dependent on nobody.*" (1 Thessalonians 4:10-12, *Revised Standard Version* (New York, 1946, Thomas Nelson & Sons); compare Ephesians 4:28, *R.S.V.*) "For you yourselves know how *you ought to imitate us;* we were not idle when we were with you, we did not eat anyone's bread without paying, but *with toil and labor we worked night and day,* that we might not burden any of you. It was not because we have not that right, but *to give you in our conduct an example to imitate.* . . . For we hear that some of you are living in idleness, mere busybodies, not doing any work. Now such persons we command and exhort in the Lord Jesus Christ to do their work in quietness and to *earn their own living.* . . . I, Paul, write this greeting with my own hand." (Emphasis added) 2 Thessalonians 3:7-17, *R.S.V.*

and city ministers to escape the need to labor to support themselves and their dependents. Surely Congress intended to provide the benefits of exemption for ministers of rural and small-town parishes as well as for ministers who chose to answer the call of opulent congregations in 'Big Town' and metropolis. Seen in true perspective, the Act's generous provision for exemption of ministers within the Congressional intent contrasts strikingly with the deficient and inequitable definition of the scope of that provision the habeas corpus courts undertook to carve out of the law in the instant cases.

In absence of express provision in the Act and Regulations excluding from the shield of the exemption ministers regularly or customarily preaching who support themselves by their own labor at secular jobs, it must be assumed that Congress intended to include those as well as the minister able to enjoy benefits of his parishioners' wealth so as to excuse him from need to toil for his own livelihood during the week.*

At present there are a large number of clergymen and ministers of Protestant and Jewish denominations who depend for their support upon secular work. In the Northern Baptist Convention 20 percent of all clergymen in rural sections "help earn their keep by work not connected with their churches." (Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention* (1945) Judson Press, Philadelphia, p. 72) In the Southern Baptist Convention the percentage is much higher.

Twenty-four percent of all Protestant clergymen in the United States in 1939 received less than $600 annual salary from their respective churches, of which 14 percent received less than $99 annually. "There is nothing to indi-

* Even the National Headquarters of the Selective Service System recognizes that ministers of many denominations are required to perform secular work in order to sustain themselves while engaged in the ministry. State Director Advice 213-B, Part III, ¶ 3. (Sunal's Exhibition C)

cate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." (Landis, *Yearbook of American Churches* 1945, Federal Council of Churches of Christ in America, Sowers Printing Co., Lebanon, Pa., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.)

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons), Mennonites, and many others are dependent entirely upon secular work for their support, no salary being paid to their ministers as a general rule.*

It is to be observed that each prisoner actually devoted 150 hours monthly to preaching and the duties of his ministry, which is more time than is devoted by the clergymen who have congregations wealthy enough to support them without performance of secular work. The orthodox church-sustained clergy do not spend near as much time in their preaching activities, yet they do not sustain themselves by secular work as do the prisoners.

Throughout history of religious organizations "ministers of religion" have been distinguished from "church-sustained clergy". Even the self-supporting ministers contributed more than the clergy to the spread of religion amidst the pioneers in the days of expansion to the West.

"This society [Watch Tower Bible and Tract Society] publishes a semi-monthly journal, called 'Zion's Watch Tower and Herald of Christ's Presence;' . . . quantities of free literature, printed in many languages, are circulated continually. Any or all, who can give any or all of their time to the Lord's work, are His ministers, ordained of

* "'I am the only person in the church,' [Brigham] Young said to Greeley in 1859, 'who has not a regular calling apart from the church service'; and he added, 'We think a man who cannot make his living aside from the ministry of the church unsuited to that office.'" Linn, *The Story of the Mormons* (1902, The Macmillan Co.) p. 576.

Him alone,—no other conditions being necessary." Besse, *Church History* (1908, Holzapfel Pub'g Co., Cleona, Pa.) pp. 256-260.

". . . about the anniversary meetings, . . . a brief, summary view. . . . About two hundred of God's ministers were in attendance, all told—for *all* are ministers, servants of the truth, from our standpoint and from the standpoint of God's word; in which all are recognized as *priests*—of the royal priesthood . . . The general sentiment . . . was, that they would be all the more diligent hereafter to pass the pleasant bread of truth to the hungering sheep of the Lord." *Watch Tower* (Watch Tower Bible and Tract Society, then Allegheny, Pa., now New York), April 1890, Vol. XI, No. 5, p. 1.

"The church has always been more successful in winning kingdoms for her Christ, when she has adopted just this lay preaching method. . . . The whole church a royal priesthood, and so the whole church a preaching church, that is the New Testament ideal." *Lay Preaching* (Secretary's Annual Report), Hoyt, American Baptist Publication Society, 1869, New York, p. 21.

The only way the preaching job could be successfully done in the pioneer days was said to be "by the preaching and teaching, under Episcopal direction, by laymen deriving their support from their own secular labors." *The Missouri Valley and Lay Preaching*, Wharton, 1859, New York, p. 18.

"Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4: 10, 11) . . . From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubt-

less, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchical spirit which became developed at a later period. . . . In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. . . . The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century." *Cyclopedia of Biblical, Theological, and Ecclesiastical Literature*, McClintock and Strong, New York, Harper & Bros., 1880, Vol. 5, pp. 296, 297.

The English Court of Appeals held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord v. Hiscock*, 86 L. J. K. B. 941) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Saskatchewan held that a registrant was entitled to exemption from all training and service as a minister of religion. (*Bien v. Cooke*, 1944, 1 W.W.R. 237) There the minister spent six days a week farming. No special educational requirements were necessary. All that was required was that he satisfy

the general secretary, who was a railroad engineer, that he believed the New Testament, and that he met the necessary moral requirements.

*United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, held that the regular performance of secular employment was not incompatible with the claim for exemption as a regular minister of religion: "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."

The holding and results reached in the *Trainin* case are not apposite here. However, the principles laid down in the opinion in that case can aid this Court to find that the prisoners here are regular ministers of religion. It should be observed that in the *Trainin* case the Second Circuit Court found that the registrant did not regularly perform his functions as a rabbi. Moreover, the court found in the draft-board record in that case that Trainin never pressed his claim very strongly. Also the court found that his testimony and proof concerning the regular performance of his functions as a rabbi were thoroughly discredited. No such circumstances exist in the instant cases. Here the prisoners were not discredited in their testimony. No doubt arose that they performed regularly their duties as ministers of religion. No question was raised as to their good faith. No evidence was offered that they did not perform their duties as ministers of religion.

Even assuming, for the purpose of argument only, that the prisoners are not, in the opinion of the Court, regular ministers of religion within the meaning of the Act and Regulations, they are, nevertheless, ordained ministers of religion.* Under the circumstances that the prisoners are

* Selective Training and Service Act, § 5 (g); Selective Service Regulations, § 622.44.

ordained and regularly performed their duties as ordained ministers, "a more difficult question" is presented. *United States ex rel. Traisin* v. *Cain*, 144 F. 2d 944.

Since neither the Act nor the Regulations exclude dissentient groups, they cannot be construed by the court to exclude unorthodox ministers. It must be assumed that the Act and Regulations were intended to embrace within the exemption the ministers of all denominations, whether popular or unpopular, orthodox or unorthodox, whether conformist or dissident. Any other view would require us to impute to Congress the intention of discriminating between religious denominations and ministers according to nebulous or arbitrary standards, with resultant inequitable, crochety application of the statute as attempted by the district courts in these cases.

A realistic approach to the application of the Act here providing for benefits to religious organizations requires that the Court make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe*, 31 Beavin 14) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones*, 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided in Section 5 (d) of the Act for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend exemption to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Kniskern* v. *Lutheran Churches*, 1 Sandf. Ch. 439, 507 (N.Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahue* v. *Richards*, 38 Me. 379, 409. Cf. *People* v. *Board of Education*, 245 Ill. 334, 349; *Grimes* v. *Harmon*, 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being." (*State ex rel. Freeman* v. *Scheve*, 65 Neb. 853, 879) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele*, 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible scope." (*State ex rel. Freeman* v. *Scheve*, 65 Neb. 853, 878, 93 N. W. 169)

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township*, 2 Ohio 108; *State* v. *Trustees*, Wright 560 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker

society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual opinion in administering justice. (*People* v. *Pillow*, 3 N.Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher*, 49 Mass. 153; *Gass* v. *Wilhite*, 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy*, 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society*, 6 N.Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. (*Waite* v. *Merrill*, 4 Me. (Greenl.) 102, 16 Am. Dec. 238, 245)

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." *Minersville* v. *Gobitis*, 310 U.S. 586, 604.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemp-

tion, saying: "Neither this court, nor any other authority judicial or executive, in this government, is a hierarchy clothed with the power of determining the orthodoxy o any religious sect or denomination. It does not vary th question, in the present case, that Mr. Cain belonged t a sect of religionists, who perform ministerial labor gra tuitously."

In the decision styled *In re Reinhart* (9 Ohio Dec. 44 445) the court said: "The moment an attempt is made t limit or restrict ordination to some special form of cere mony, we begin to discriminate between the diverse mode and forms of ordination practiced by the various religiou societies. The laws of Ohio make no discrimination in an respect between Catholic or Protestant, Greek, Gentile Jewish, or any other religious societies or denominations much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially i the Roman Catholic, Anglican and Greek churches; conse cration to the ministry by the laying on of hands of a bisho or bishops; in other churches, consecration by a presbytery synod, or council of ministers.'"

The intent to give the Regulations a broad, liberal inter pretation as to what constitutes a minister of religion i proved in the fact that the terms of the Act and Regulation have been extended to include within the exemption pro vision "Lay Brothers" of the Holy Roman Catholic Church (State Director Advice 213-B, Part IV, subd. 2) (Sunal's Ex hibit C) It should be observed that the "Lay Brothers" are not, in the strict sacerdotal sense, ministers of religion, a declared by the Director of Selective Service, who concern ing the broad interpretation to be placed upon the Act said "Freedom to worship is one of the four freedoms for which we fight. Even in days before we realized that our civili zation was to be challenged, even to its religious roots, i

was felt that regular and duly ordained ministers should be exempted from military duty. . . . The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching: Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's witnesses, who sell their religious books, and thus extend the Word. It includes *lay brothers* in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion." * (Emphasis added)

"Lay Brothers" of the Holy Roman Catholic Church are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy. "We may distinguish two types of Brothers; viz.: those who directly serve the people at large, for example by teaching, and those who do so indirectly, namely, by directly serving priests or other religious who in turn serve the people directly. . . . . Let us consider the offices performed by the second group a little more closely. These men do the manual work necessary in religious communities and institutions. Their ministrations, given freely, are absolutely necessary, if the priests are to be free to attend to their special work. Hence, the arguments which prove the need of clergy prove likewise the need of these . . . very important members of religious communities. They also ought, therefore, to be exempted." ** Menial work and

* *Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42 (Government Printing Office, Washington) pages 239-241.

** Kennedy (Congressman Martin J.) letter to House Military Affairs Committee, August 7, 1940, *Hearings*, etc., 76th Cong., 3d Sess., on H.R. 10132, pp. 628-630.

"*Lay Brothers*—Religious [persons] occupied with the secular affairs of a monastery, such as taking care of the sacristy, buildings, farms, household, and visitors. Very often they are artists and craftsmen." *National Catholic Almanac* 1945 (compiled by the Franciscan Clerics of Holy Name College, Washington, D. C., and published with Ecclesiastical

entire absence of the doing by them of any strictly ecclesiastical duties constitute the whole functional status of one very important of two types of "Lay Brothers". They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits".*

There is no question that the administrative interpretation of the Act and the Regulations have been broad, to every group except Jehovah's witnesses, who have been recognized as a religious organization standing on the same level with other organizations under the act.

In the general instructions concerning ministers of religion issued by the National Headquarters of the Selective Service System it is stated that the "historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case." (State Director Advice Number 213-B, Part III, Par. 3, Issued June 7, 1944.) ** In the case of Jehovah's

Approbation by Saint Anthony's Guild, Paterson, N. J.), page 231. Compare carefully *Lay Brothers* definition of December 14, 1940, "*officially certified* to National Headquarters" of Selective Service System by Archbishop (now Cardinal) Mooney. (Sunal's Exhibit C, State Director Advice 213 B) See also OPINION No. 2, National Headq'rs, Selective Service System, Jan. 25, 1941.

* *The Catholic Encyclopedia* (1907, Robert Appleton & Co., N. Y.) Vol. 9, p. 93. "Lay Brothers" who do not preach from the pulpit, and who do not minister the sacraments or otherwise function as do the ordained Catholic clergy, number at present, in the United States, more than 10,000. (Official Catholic Directory 1946, New York, P. J. Kenedy & Sons) That, it is to be observed, is more than twice the entire number of some 4,000 of Jehovah's witnesses who have been illegally classified and committed to prison under the Act because certain draft boards *wrongly* did not regard them as having, under the law, a standing equivalent to that of Roman Catholic priests and the clergymen of other popular orthodox denominations.

** Amended September 25, 1944. It incorporates the provisions of Opinion No. 14 of Volume III of National Headquarters Selective Service System Opinions concerning Jehovah's witnesses dated June 14, 1941.

witnesses the historic nature of their missionary evangelistic society whereby every one must be a duly trained and equipped minister of religion regularly engaged in preaching as a missionary evangelist was almost uniformly ignored. The historic nature of the ministerial functions of other religious organizations was imposed in many cases so as to exclude Jehovah's witnesses from their claim for exemption.

The Director provided for the benefit of all religious organizations except Jehovah's witnesses the wise and generous provision that in "some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work." (*Ibid.*) In the case of Jehovah's witnesses it was directed that the eligibility of one of Jehovah's witnesses depended on whether "he devotes his life in the furtherance of the beliefs of Jehovah's witnesses". (*Ibid.*, Part IV, Paragraph 3) This was generally construed so as to deny Jehovah's witnesses engaged regularly in preaching the gospel as missionaries each week who supported "himself; either partially or wholly, by secular work."

The boards were instructed that in "view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status." (*Ibid.*, Part III, Paragraph 4) Yet in the case of Jehovah's witnesses the boards were implicitly instructed to disregard the written proof submitted by Jehovah's witnesses in the following language: "Information presented in the case of a registrant who claims to be a minister of the Jehovah's witnesses group must show fact regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status." (*Ibid.*, Part IV, Paragraph 4)

The Seventh-Day Adventist Church colporteurs who are engaged in mere distribution of books from place to place and door to door were declared to be exempt. It is said: "Members of this church consider their colporteur evangelistic work to be of highest importance in the propagation of the faith. They look upon the men who do this work as engaged in a vocation comparable to the gospel ministry, even though they are not ordained. When a registrant is found to be actually engaged in a bona fide manner in full-time work of this nature and files evidence of possession of a colporteur's license or colporteur's credentials, he may be considered a regular minister of religion." (*Ibid.*, Part IV, Paragraph 10)

In the case of Jehovah's witnesses it was required that they file a list of their full-time missionary evangelists known as pioneers. This list was frozen in 1942 and no names could be added to it. It was only the full-time missionary evangelists whose names were on this list that the National Headquarters declared to be entitled to consideration as ministers of religion. (*Ibid.*, Part IV, Paragraph 3) All bona fide full-time pioneer Jehovah's witnesses whose names did not appear on the list certified to by National Headquarters of the Selective Service System were eligible for consideration as ministers of religion only if they could establish, in addition to devoting their full time to the ministry, that (1) they performed functions normally performed by ministers of orthodox religion, and (2) they show that they were regarded by other Jehovah's witnesses as standing towards them as do the clergy of the orthodox religions. (*Ibid.*, Part IV, Paragraph 3)

These two requirements (demanded of bona fide full-time pioneer missionary evangelists of Jehovah's witnesses coming clearly within the definition of ministers of religion as the term is used in the Act and the Regulations) denied them classification as ministers of religion and exemption because they could not establish that they came up to the

standards of the orthodox clergy. This requirement was not made of the Seventh-Day Adventists or any other missionary evangelistic group or society of ministers. It discriminated against Jehovah's witnesses and imposed the orthodox religious standards of other religions upon full-time missionary evangelists. As a result they were excluded from the exemption terms of the Act and Regulations under which they clearly came.

The administrative interpretation of the position of Jehovah's witnesses under the Act and Regulations as announced by the National Headquarters of the Selective Service System has been declared by the court below in the Kulick case to be extremely narrow. In that case it was said:

"Furthermore, Kulick apparently persuaded the board at the August hearing that he regularly preached five hours a day; and there was strong reason for saying that that made him a "regular minister" within the extremely latitudinarian interpretation which 'Opinion No. 14' put upon the term, 'regular minister,' when applied to Jehovah's witnesses."

In another case the United States Circuit Court of Appeals for the Second Circuit has declared that the consideration of the claim of Jehovah's witnesses according to the orthodox standards was in effect like applying the standards of the Sanhedrin, the scribes and Pharisees, to determine whether Christ Jesus and his apostles were ministers of religion. The application of the standards of one religious organization to determine the rights of another under the Act was condemned. This decision was in the case of *United States* v. *Balogh*, 157 F. 2d 939. In that decision the court said, *inter alia*:

"Jehovah's witnesses appear to be a sect of a kind by no means uncommon in religious history, which relies for the inspiration of preachers and members alike upon the Inner Light of immediate personal conviction, ineffable but

nonetheless imperative, which invades its possessor's being with an irrefragable authority. . . . Yet it would be a misapprehension to exclude such sects from the purpose of Congress, to which we are to impute, not only a tolerance of, but a positive concern for, the preservation of all creeds that can be found grouped within the widely comprehensive term, 'religion.' . . .

"Be that as it may, the report shows that the 'Panel' completely misunderstood its functions, if it had any proper functions whatever in such a case, which it did not have, as we shall show. It rested its conclusion upon an interpretation of the statute that Congress did not mean to exempt the ministers of any sect in which laity and ministry or clergy were not separate; a question on which the board had no right to receive advice anyway, and, in addition, one to which the 'Panel' gave the wrong answer. . . . Besides, there was not the slightest excuse for sending the case to a 'Panel' so constituted. As we have said, the record does not tell us, except for the names, who were the three gentlemen who made it up; but, even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's witnesses. . . . But they were put in a position where their specialized knowledge, whatever that may have been, could not be used, as indeed appears from the fact that all they did—or could do—was to lay down instructions to the board, based upon their construction of the intent of Congress, as to which they were not an iota better qualified than the board itself. . . . So in the case at bar 'Headquarters' might have referred the case to a panel, especially acquainted with the practices of Jehovah's witnesses, for an opinion whether in accordance with these, Balogh would be recognized as a 'regular minister'. But the actual 'Panel' had no such competence, and did not assume to have; it did all it could do; it construed the statute. Finally, it was to the last degree ingenuous to expect any light from such a panel, which, to act

at all, had first to divest itself of those ingrained habits of mind inevitable in any calling; and to bring a completely detached judgment to a heterodox creed. That is not an impossibility, indeed, perhaps the 'Panel' in this case succeeded in mastering the handicap; but handicap it was, and a handicap from which the board itself was free, save as the report may have influenced it. Such a panel could not contribute, and was improperly interjected into the proceedings."

Although the propriety of applying the standards of one religion to that of another in determining rights under the Act has not been condemned yet by this Court, it has been declared to be an open question. In the case of *Eagles* v. *United States*, 67 S. Ct. 313, 318, it is said, among other things, that

"Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh*, 2 Cir., 157 F. 2d 939. But it has not been shown that such a condition obtained here."

While the narrow and orthodox requirements of the above administrative opinion has been generally considered by the local boards for what it says, resulting in many inconsistent classifications, the National Headquarters in the administration of its Appeals Section, which is a division of the headquarters devoted to determining whether appeals shall be taken to the National Headquarters, has not actually confined the opinion to such narrow bounds. In determining whether an appeal should be taken to the President at the instance of the National Director the rigorous requirements have been considerably relaxed. In his letter of July 15, 1946, printed by the petitioner in the Kulick case as an exhibit to his brief, Major Wherry for the Director of Selective Service said, *inter alia*, that "whether an official of the Jehovah's witnesses is to be recognized as a regular or duly ordained minister must be

determined in each individual case based not only upon whether he is regarded by other Jehovah's witnesses as a minister of religion but also upon whether he performs functions which are those generally recognized as religious and ministerial functions normally performed by regular or duly ordained ministers of religion and the extent to which he devotes his life to the furtherance of your beliefs. . . .

"From this information we have gained the impression that many of your Company Servants and Servants to the Brethren hold positions of considerable religious leadership within the organization. We have felt that the demonstration of this leadership may qualify a man to be considered a minister of religion by Selective Service . . . This has been done without regard to the question of the registrant's having been engaged in certain secular employment.

"We mention this because it appears that you feel undue consideration has been given by Selective Service to the secular employment engaged in by certain Jehovah's witnesses. We emphasize the fact that in our opinion the controlling factor in the final analysis of any case wherein a man claims to be a minister is the question of his ministerial work and not that of his secular employment. However, information indicating that a man who claims to be a minister is engaged in secular employment may raise a question regarding the extent that secular employment crowds out and precludes ministerial activities. . . .

"Other members of Jehovah's witnesses may be judged also by either of these standards. However, it would appear that most of them must be judged on the basis of the extent to which they have devoted their lives to the work of your church. Regarding this we have set no standard number of hours in religious work as a standard, although you have stated to us that a 'Pioneer is required to devote a specified minimum of 150 hours per month to his ministerial duties.' You have also told us that 'there are also a number

of special pioneers. These are required to devote 175 hours per month to their work . . . . . .

"As we have stated hereinbefore, we have not accepted your specified number of hours of work for a Pioneer as a standard of work for a member of the minor clergy. But where one of your men fails in meeting that quota, for reasons other than sickness, we feel that no good reason exists for us to take action with a view of procuring a IV-D classification for the man. Accordingly, we informed you that no further action was contemplated in this case. . . .

"If the man demonstrates through his religious and ministerial work that he holds a position of leadership in your church and that his exemption 'is necessary to protect the church' or if the man demonstrates that he has consecrated his life to religious service, we feel that he is entitled to classification in Class IV-D and exemption from training and service."

There is not the slightest bit of doubt that even under this administrative interpretation of the Act and Regulations, relaxing a bit the more latitudinal definitions appearing in the State Director Advice, the prisoners, Kulick and Sunal, come within the definition of a minister of religion. The life of each is devoted to the ministry of Jehovah's witnesses. They are each able to devote the time required to fill the organizational quota for full-time missionary evangelists. The secular work that they performed did not crowd out and preclude their ministerial activities. Neither of them failed to meet the quota of their full-time pioneer requirements because of the part-time secular activity. Their course of action demonstrated that they had consecrated their lives to Christian service as ministers; therefore, under the interpretation of July 15, 1946, they should be "entitled to classification on Class IV-D and exemption from training and service." (Letter of July 15, 1946.)

The Government argues that in event the writ of habeas corpus is sustained in each of these cases there is every likelihood that the prisoners will be prosecuted again. The prisoners have every reason not to believe these statements made by the counsel for the wardens in these cases. The Government said that Gibson and Estep would be tried again in event this Court should discharge them. In each of the *Gibson* and *Estep* cases the Government told the Court that the accused was not a minister and that the draft board did not err. But, strange as it may seem in the face of these bold assertions to this Court upon the ministerial status of those men, when the cases were remanded to the district courts the Government directed that the indictments be dismissed. The prosecutions in both cases in which both men had been formerly convicted and sentenced to prison were dismissed. This is presumably because the Government reached the opinion that the draft board orders were invalid for each of the reasons contended for by the prisoners here.

Jehovah's witnesses make a distinction between "shepherd and flock". Jehovah's witnesses consider that they are the "shepherds" because they preach to and teach the people as ministers of Almighty God, JEHOVAH, under His appointed Good Shepherd, Christ Jesus. This they do from door to door and publicly, as did Christ Jesus, His apostles, the disciples, and the thousands of Christian ministers who were associated with them in the various congregations at Jerusalem, Antioch, Alexandria, Corinth, Rome, and elsewhere. The "flock" served by Jehovah's witnesses is to be found in the homes of the people, where Jehovah's witnesses conduct Bible studies, serving millions of persons annually.*

* See 1947 *Yearbook of Jehovah's witnesses* (New York, Watch Tower Bible and Tract Society), pp. 36, 46, 257. Compare Swaczyk v. United States (CCA-1) 156 F. 2d 17, cert. denied Oct. 14, 1946, 67 S. Ct. 77; Smith v. United States (CCA-4) 157 F. 2d 176, cert. denied Nov. 12, 1946, 67 S. Ct. 189, rehearing denied Dec. 16, 1946, 67 S. Ct. 367.

Moreover, there are 70,000,000 people in this country who do not belong to any church, as well as many other millions belonging to a church who do not attend. These millions need to be served by missionary evangelists. Jehovah's witnesses have answered the need by calling upon the people as missionaries from house to house.

In performing their missionary work, Jehovah's witnesses act as ministers, going to the congregation. They, unlike orthodox clergymen, do not require the congregation to come to them. Jehovah's witnesses act as servants to the people, as did the Lord Christ Jesus, who was a humble servant of the people of good will with whom He met in His door-to-door missionary work.*

Each one of Jehovah's witnesses must preach in order to be one of Jehovah's witnesses. One who does not preach is not one of Jehovah's witnesses. Jehovah's witnesses are a society of missionary evangelists, engaged in missionary preaching work of the highest type, at home as well as abroad, and throughout the whole world. It is not unusual to hear of a congress of ministers. The Jesuit organization (Society of Jesus) that functions in connection with the Roman Catholic Hierarchy is, for example, a society of ministers. Various foreign-missionary societies of the popular orthodox religious denominations are composed exclusively of ministers, ordained and unordained, who preach the religions of the respective denominations only in foreign countries from door to door and house to house in the same way as do Jehovah's witnesses in the United States and in all other countries. Therefore it is highly improper and inappropriate to compare a congregation of

* "Whether is greater, he that sitteth at meat, or he that serveth? is not he that sitteth at meat? but I am among you as he that serveth." —CHRIST JESUS, at Luke 22:27.

"Behold, I stand at the door, and knock: if any man hear my voice, and open the door, I will come in to him, and will sup with him, and he with me."—CHRIST JESUS, at Revelation 3:20.

Jehovah's witnesses with a congregation of Baptists or other Protestant laymen-religionists, or Jews, in the orthodox sense. Of course in those orthodox religious congregations of laymen only one or two persons minister (as recognized ministers) to the entire congregation. Such ministering consists of preaching done from a pulpit to the assembled laymen-congregants. Those preached to come to the preacher to hear him. The preacher does not go to the people at their homes as do Jehovah's witnesses. Members of congregations of orthodox clergymen do not preach as do Jehovah's witnesses. Such members or congregants are only preached to. Among Jehovah's witnesses each one of Jehovah's witnesses is a preacher and preaches regularly to hundreds, if not thousands, of others each year. Hence, to compare a congregation of laymen, served by an orthodox religious clergyman, to an assembly of missionary evangelists (Jehovah's witnesses), and by rule of thumb to say that such assembly of missionary evangelists is not a group of ministers simply because the congregation of laymen is not a group of ministers, is syllogistic and logistical legerdemain which discriminates and destroys entirely the intent of Congress in providing exemption for ministers of all denominations regardless of whether they were able to get a congregation to come to them or whether they had to go to the congregation; and regardless of whether they were wealthy enough to preach without choosing or being forced to resort to secular work to support themselves in their ministry.*

It is fitting to quote from the opinion in *United States* ex rel. *Hull* v. *Stalter* (CCA-7) 151 F. 2d 633, where, *inter alia*, the court said:

* For further reference to a more extensive argument showing why the invalidity of the boards' determinations in denying prisoners' claims for exemption as ministers of religion in these cases, see the printed brief filed by petitioners in Smith v. United States, No. 66, October Term 1945 and Estep v. United States, No. 292, October Term 1945, pp. 131-190.

"Much is said in the briefs both complimentary and derogatory to Jehovah's Witnesses. With this argument we are not concerned. Whatever a draft board or a court, or anybody else for that matter, may think of them is of little consequence. The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. . . . In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized charge [*sic*, properly 'church'] religious sect, or religious organization of which he is a member . . .' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church . . .' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (*Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated:

> "The ordinary concept of 'preaching and teaching' is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach

or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message 'from housetops' or write it 'upon tablets of stone'. He may give his 'sermon on the mount', heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. . . . He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. . . . To be a 'regular minister' of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant."

". . . . There is not a scintilla of proof which impugns his honesty, good faith or devotion to the cause. Respondent makes no criticism of relator [Hull] in this respect. Neither has the Selective Service System of Ohio done so insofar as relator is individually concerned. Such criticism as is disclosed by the record was directed entirely at Jehovah's witnesses as a class."

There has not been a consistency in the classification of Jehovah's witnesses under the Act. Many men have been denied classification as ministers of religion when upon the same set of facts other boards have granted exemptions. Many boards have shown a deep-seated prejudice against Jehovah's witnesses. Thousands of men have been denied proper classification because the boards, acting upon what they considered to be a proper interpretation of Opinion Number 14, have applied the principles of the orthodox religious organizations in determining what is a minister

of religion. Discrimination has, at times, become so flagrant as to cause honest persons not connected with Jehovah's witnesses to condemn such action. A typical case is that of Floyd Eugene Hull, a registrant of Perry County, Ohio, Local Board Number 2, which is located at Somerset, Ohio. He moved to Lawrenceburg, Indiana, where he continued his ministry. In due course of time, having been denied his claim for exemption by his local board, the local board of Lawrenceburg was directed by the Ohio board to order him to report for training and service. The draft board file was forwarded to the Lawrenceburg board in order to complete the process. Upon a review of the draft board file the Lawrenceburg board wrote a letter of protest to the State Director of the Selective Service System for Indiana calling attention to the fact that Hull, a minister of religion, was being illegally dealt with by the Ohio board. The board, among other things, said: "We are not writing in the spirit of criticising the action of this man's own Local Board, but we certainly believe that there is a bad misunderstanding somewhere along the line. . . . In the second place, . . . he also is an ordained minister of Jehovah's Witnesses according to the qualifications of his own Sect. . . .

"While it is true that this Sect may not be held in such high esteem by various of the religious and others, inasmuch as it is recognized in Washington under the Selective Service Act, the same consideration should be given a minister of his faith as is accorded those of other more recognized faiths. . . ."

"We are ready and willing to carry out all orders from our Headquarters, but, in all fairness to this man, we feel that some sort of investigation should be made to find out just what is wrong, if anything, appearances certainly supporting this impression."

"We might add that the personnel in this office is made up of Methodists, Episcopalians, and Lutherans, and has no

interest in Jehovah's Witnesses except from the standpoint of fairplay according to Selective Service law and testimony, and consistency in handling recognized ministers of the Gospel." (Transcript of Record, *United States* ex rel. *Floyd Eugene Hull* v. *John Stalter*, No. 8869 October Term 1945, United States Circuit Court of Appeals for the Seventh Circuit). Following the release of Hull from custody through the judicial process his case was remanded to the Selective Service System for reprocessing.

Hundreds of other cases illustrating the lack of consistency and arbitrariness of innumerable local boards could be cited. Space in this brief will not be taken to demonstrate the point here made. An appendix to this brief, however, contains scores of typical cases according to categories. It is submitted that the cases stated in the appendix are available to this Court through the files of the Selective Service System which this Court can judicially notice.

**B**

**The local board in the Kulick case deprived him of a full and fair hearing before the board of appeal through failure to reduce to writing oral evidence offered by Kulick upon his personal appearance. This action was contrary to the Regulations and violated his rights to procedural due process contrary to the due process clause of the Fifth Amendment to the Constitution.**

The undisputed evidence showed that the local board failed to reduce to writing and place in the prisoner's file vital oral evidence submitted by him at a personal appearance relative to his status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received and considered by the local board. The local board, although it did hear the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the Regulations. The board of appeal did not see or have an opportunity to consider all the additional evidence. It did not know of the action of the local

board in withholding vital oral evidence received and considered.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia*, "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2(b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13(b))

Section 627.13 (b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for Kulick's rights under the regulations.

The regulations intend that the classification upon appeal shall be *de novo:* The board of appeal and the President do not have an opportunity to permit the registrant to appear before them personally; they are confined in their consideration to the record made in writing. If the local board did not comply with the regulations requiring

it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good a position to pass on the case as was the local board. The regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

The classification of I-A was affirmed or continued *de novo* solely because the local board failed to include the new oral evidence in the cover sheet. It must be conclusively presumed that the classification of Kulick would have been different and he would as a minister have been exempted from training and service had the local board complied with the Regulations and included a summary of his oral evidence in the file.

This is the precise question that was presented to the Third Circuit Court and to this Court in *Estep* v. *United States*, 150 F. 2d 768, 327 U. S. 114. However, in spite of the fact that neither court passed upon the merits of such defense, the two dissenting judges of the court of appeals exhaustively reviewed the law in this connection. Reference is made to their opinions. 150 F. 2d 768, 773-781. Cf. *Smith* v. *United States* (CCA-4) 157 F. 2d 176.

If a local board fails to reduce to writing oral evidence and which was received and heard by it, thus withholding such evidence from the appellate agencies of the Selective Service System, the local board will have been transformed into an autonomous agency and the appellate agencies of the Selective Service System made impotent, null and void and forced to depend for their effective operation exclusively upon the whim, caprice and will of the local board. If the regulation on reducing oral evidence considered by

the local board to writing is held to be for the benefit solely of the local board and that the judgment of the local board thereon is final, then the appellate agencies of the Selective Service System will have been deprived of their right to correct errors and illegal acts committed by the local board, contrary to the Regulations.

Certainly Congress did not intend to give the local boards unlimited power to withhold and keep from the appellate agencies evidence offered to it and considered by it under the Regulations. This is especially true because classifications upon appeal are made *de novo* and such classification should be made according to the status of the registrant at the time of the classification rather than at the time of the registration of the registrant. *United States* ex rel. *Hull* v. *Stalter*, 151 F. 2d 633 (CCA-7).

Since the board of appeal has the final say as to the classification to be accorded a registrant, it must be assumed that the authors of the Act and Regulations intended that the local board, in all cases where appeals were taken by the registrants, should perform a duty in behalf of the board of appeal very much like a master, referee or notary public taking a deposition. It is the function of the local board to gather all the evidence for consideration by the board of appeal or the President, which appellate agencies pass on all questions involved. If it were otherwise, so that the local board could withhold evidence, written documentary or oral, from the registrant's file forwarded to the board of appeal, the local board would have unlimited powers and arbitrary discretion to determine just what evidence the appellate agencies should or should not consider under Section 623 of the Regulations. Thus the authority of the appellate agencies could be circumscribed and their power sapped by whimsical actions of the local board.

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has

been neglected or ignored." CARDOZO, J., *Ohio Bell Tel. Co.* v. *Public U. Comm'n*, 301 U. S. 292, 304. See, also, *Shields* v. *Utah-Idaho* Central Ry., 305 U. S. 177, 182.

"Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." *Morgan* v. *United States*, 298 U. S. 468, 479-481.

In *Kwock Jan Fat* v. *White*, 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the Court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from this country."

Attention of the Court is called to the decision of the Fourth Circuit Court of Appeals in *Smith* v. *United States*, 157 F. 2d 176 (cert. denied 67 S. Ct. 189, rehearing denied 67 S. Ct. 367). There the identical proposition was raised

in the appellate court. That court held that it was a question of fact for the jury to decide as to whether or not the draft board had violated the Regulations. The circuit court held that the defendant was not entitled to have his motion for judgment of acquittal granted and the indictment dismissed at the close of all the evidence on account of the failure of the local board to reduce to writing the evidence offered. However, the facts in that *Smith* case can be distinguished from the facts in the *Kulick* case. In the *Smith* case the Government contended that there was an issue of fact as to whether or not Smith actually gave any oral evidence in addition to the written evidence appearing in the questionnaire. The chairman of the local board testified in the *Smith* case and disputed Smith's testimony as to the evidence Smith alleged he had given to the board at the time of his personal appearance. Here there is no dispute between the testimony of Kulick and the testimony of the clerk and members of the board. Both the clerk and members concede and contend that Kulick testified extensively about matters pertaining to Kulick's classification, including new evidence offered by Kulick. There is absolutely no dispute as to the fact that Kulick actually gave additional oral testimony at the time of his personal appearance. This fact is established from the Government's own witnesses. Therefore there was no issue of fact on this matter to be submitted to the jury. The undisputed evidence showed that the local board violated the Regulations in failing to reduce to writing the oral evidence offered by Kulick. Therefore the decision in *Smith* v. *United States* (157 F. 2d 176) does not apply. In any event, even if it did apply, the decision of the *Smith* case is erroneous and should not be accepted as authority here.

The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of Kulick's case. The act of the local board was tantamount to a denial of the

right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below properly reversed the judgment and discharged the prisoner. Kulick says, however, that the court should have gone further and held that the illegality of the order was ground for dismissal of the indictment and a remand of the case to the Selective Service System. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. Cf. *United States* v. *Peterson* (DC ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (DC ND. Calif.) 52 F. Supp. 393; Ex parte *Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

## Concluding Summary of Argument

The first question to be decided in these two cases is whether the judgments of conviction are void because of the denial of procedural due process by the convicting courts upon the trials of the prisoners. Orderliness of appellate procedure and due process of law in habeas corpus proceedings allows the Court to consider the second question presented by the prisoners only in the event that the Court finds the proceedings in the convicting courts did not invalidate the judgments. The second question of whether the judgments of convictions are void because of the invalidity of the supporting administrative proceedings will not be reached in event the Court finds that the judgments of conviction are void because of the denial of due process by the convicting courts.

Prisoners here claim that the convicting courts denied them their rights to be heard in their only defense that the orders of the draft boards supporting the indictments were invalid. They claim that the denial of such right to make

such defense was a violation of the Constitution so as to make the judgments subject to collateral attack on habeas corpus. The prisoners here also urge that the convicting courts did not acquire jurisdiction of the indictments because the administrative proceedings supporting the prosecutings were a nullity. The draft board proceedings were a nullity because the prisoners had no duty to obey the orders. The prisoners had no duty because they were exempt as ministers of religion under the Act.

The Court of Appeals for the Second Circuit properly concluded in the *Kulick* case that the convicting court had denied Kulick the right to defend his case. It held that this denial properly entitled Kulick to a discharge from custody. That court did not reach the second question of the invalidity of the administrative agency's proceedings. However, the Court of Appeals for the Fourth Circuit did reach the second question in the *Sunal* case. It held that the denial of the right to defend his case by the convicting court did not entitle Sunal to a discharge. Thereupon the court proceeded to determine if the administrative order supporting the indictment wa invalid. Contrary to Sunal's contention the court found that the draft board proceedings were valid.

It is suggested to the court here that the same results that were reached by the Court of Appeals for the Second Circuit should be reached by this Court in both of these cases. It would, therefore, be proper to discharge both prisoners here for the reason that the convicting courts deprived the prisoners of a vital constitutional right upon their trials. Even though the court of appeals in the *Kulick* case may have erred in holding that the writ of habeas corpus could be used as a writ of error or in lieu of an appeal its judgment ordering Kulick discharged should nevertheless be affirmed. The judgment of the court of appeals finds support, however, in the fact that the judgment of the convicting court is void because Kulick was denied a constitutional right to a judicial trial. Kulick may support his

favorable judgment on any ground that appears in the record. *Le Tulle* v. *Scofield*, 308 U.S. 415, 421; *Gainesville* v. *Brown-Crummer Co.*, 277 U.S. 54, 59; *Bell Telephone Co.* v. *Van Dyke*, 296 U.S. 533; *Laws* v. *Davis*, 281 U.S. 702. If for this reason the Court reaches the same results in the *Sunal* case for the same reasons the judgment of the court of appeals in that case should be reversed and the prisoner ordered discharged from custody.

The prisoners in both of these cases were denied a judicial trial contrary to the Constitution. The abridgment of their rights by the convicting courts makes the judgments of convictions void. In each case the error committed was of such an egregious character and so violative of the specific provisions of the Constitution as to be more than a mere error of law.

The convicting courts denied the prisoners their right to challenge the validity of the draft board orders in defense to the indictments because of the prevailing opinion among the lower federal courts that Section 11 of the Act did not allow the defense to the order in each case. The inferior federal courts had erroneously construed the statute so as to preclude the defense. The claim is made that this was a mere error in the construction of the statute and of this Court's opinion in the case of *Falbo* v. *United States*, 320 U.S. 549. It has been at all times apparent that such illegal construction of the Act finds no justification in the language of the Act or of this Court's opinion in the *Falbo* opinion. On the contrary, the construction was arbitrary and capricious because it was in defiance of the implicit provisions of the Act and of this Court's opinion in the *Falbo* case.

While it may be conceded that the construction of the statute was a mere error of the law in determining whether the rights of the prisoners have been violated it is not necessary to stop there. The matter should be pursued for a determination of whether the construction was unconsti-

tutional. Did the error result in the deprivation of the prisoners' constitutional rights? If it did, then it cannot be urged that the good faith and honest belief of the judge of the convicting court in the accepted construction of the Act eradicated the serious, grievous and egregious vice from the ruling. The honest belief of the judges of the inferior courts that they were properly construing the statute does not justify the violation of constitutional rights. The issue is, did the ruling deprive the prisoners of their constitutional rights and not whether the judges of the inferior federal courts honestly believed they were correct.

It is not fair to argue that the situation here in respect to the upheaval of the inferior court law by the decision of this Court in the case of *Estep* v. *United States*, 327 U.S. 114, is similar to the change in statutory construction in *Nye* v. *United States*, 313 U.S. 33, which precipitated the habeas corpus action in *Warring* v. *Colpoys*, 122 F. 2d 642 (App. D. C.) certiorari denied, 314 U.S. 678. The erroneous interpretations of the Act by the inferior federal courts now under consideration by this Court did not have the dignity of a construction of the statute. It is fundamental that a federal statute has no meaning until it has been formally interpreted by this Court. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U.S. 499, 505; *Knight* v. *Carter Oil Co.*, 23 F. 2d 481, 484. Unless and until this Court had construed the statute the interpretation and meaning placed upon the Act by the lower federal courts was not a construction of the statute. Furthermore, the interpretation was contrary to the conclusions that implicitly appeared from a reading of *Falbo* v. *United States*, 320 U.S. 549, and *Billings* v. *Truesdell*, 321 U.S. 542. Hence the putative construction put upon the statute by the lower federal courts was *ultra vires*. Moreover, the holdings in practically all the cases decided by the federal courts involved situations where the registrants had not reported and did not exhaust their administrative remedies. Therefore the state-

ments in the opinions that the registrant could not challenge the orders of the boards in prosecutions under the Act were purely dicta. The statements did not take on the dignity of holdings. Not being holdings, but dicta, it must be considered that the statements are not real constructions of the statute.

Irrespective of what the rule may be in the ordinary case of change in statutory construction the rule of the *Warring* case would not apply here. In these cases the denial of the right to be heard is as egregious an error as would have been the denial of counsel, the denial of right to trial by jury, the refusal of a plea of former jeopardy or any other similar denial of a constitutional right, which concededly would make a criminal convicting subject to collateral attack on writ of habeas corpus. A change in construction does not immunize the denial of due process against the writ of habeas corpus.

Denial of the right to challenge the validity of the orders was a denial of the right to be heard on whether the prisoners were guilty of failing to perform a duty under the Act. The holdings of the convicting courts were in plain violation of the rights of the prisoners to due process of law and judicial trials guaranteed by the Constitution. This vice in the judgments of conviction made them subject to collateral attack on habeas corpus. It also commands the discharge of the prisoners from custody. This duty to release the prisoners cannot be defeated by the holdings of the two district courts in both these cases and the court of appeals in the *Sunal* case that if the draft boards did not violate the law the violation of the law by the district court would be harmless error.

Accordingly the judgment of the court of appeals in the *Kudick* case should be affirmed and the judgments of the court of appeals and of the district court in the *Sunal* case should be reversed and the prisoners ordered discharged.

The prisoners are desirous to have the validity of the draft board orders judicially determined by this Court, as were Estep and Dodez in their cases. But, for the same reasons this Court refused to pass on the question in the *Estep, Smith, Gibson* and *Dodez* cases, and for other reasons discussed in this brief, the prisoners suggest that it is inappropriate to do so now in these cases, unless the Court holds that the denial of the right to be heard in the criminal trials is not sufficient to justify release on habeas corpus. In that event (if this Court would reach the question) if the Court holds that the scope of review is limited to a determination of the validity of the draft board proceedings and not the proceedings of the convicting courts, then the prisoners say they should, nevertheless, be discharged. This should be done because the draft board orders supporting the indictments are invalid.

Each of the prisoners is exempt from training and service because he is a minister of religion within the meaning of the Act and Regulations. This fact was established as a matter of law in that the undisputed evidence showed that they were regularly engaged full-time in their vocation as ministers of Jehovah's witnesses under the direction of the *Watchtower Society*, a recognized religious organization. The record establishes that the draft boards arbitrarily denied their claims for exemption because of their avocation. The evidence showed that the avocation in no way interfered with their vocation of preaching the gospel. Therefore the undisputed evidence shows that there was no basis in fact for the denial of their claims for exemption and that the orders were in excess of the jurisdiction of the boards.

The mere fact that the court of appeals in the *Kulick* case did not attempt to decide the validity of the draft board proceedings does not prevent this Court, in event it reaches the question of validity of the draft board orders, from holding upon the record made before the district court,

that the draft board order is invalid in spite of the failure of the court of appeals to pass upon the validity of the draft board order. In habeas corpus proceedings this Court is not limited to a consideration of the precise question passed upon by the court of appeals or the district court, but may consider any other ground raised in the record because the statutes require that the prisoners be disposed of as law and justice require. 26 Stat. 827, 28 U. S. C. § 345; *Storti* v. *Massachusetts*, 183 U. S. 138, affirming In re *Storti*, 109 F. 807. This is similar to the power of the Court in admiralty appeals. *Duche & Sons* v. *Schooner John Twohy*, 255 U.S. 77. Therefore this Court, if it reaches the question, is in the *Kulick* case equally empowered to pass on the validity of the draft board's determination as it is in the *Sunal* case.

## Conclusion

Wherefore respondent Kulick and petitioner Sunal pray that they be discharged from custody. Therefore the judgment of the court of appeals reversing the order of the district court and discharging Kulick should be affirmed and the judgment of the court of appeals and the order of the district court should be reversed and Sunal ordered discharged.

Respectfully submitted,

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